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Supreme Court, U.S.
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No. 95 - ____

IN THE

Supreme Court Of The United States

October Term, 1995

FRED AND JANET YOUNG, d/b/a YOUNG'S DELI and formerly d/b/a COUNTRY FAIR STORE NO. 90, on behalf of themselves and all others similarly situated; JAMES FOORE, d/b/a COUNTRY FAIR STORE NO. 87, on behalf of himself and all others similarly situated,

Petitioners,

v.

COUNTRY FAIR, INC; MEADOW BROOK DAIRY COMPANY; RAYMOND L. MCGARVEY; KEITH MCGARVEY; GEORGE ARTHUR; GERALD GARCIA,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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THE QUESTIONS PRESENTED FOR REVIEW

This antitrust class action involves minimum resale price-fixing and "aftermarket" tying claims brought by convenience store franchisees against their franchisor, Country Fair, Inc. The principal component of the "tying" product is the real estate lease (and the related equipment leases) between the franchisor and its franchisees. Two franchisees, the Youngs and Mr. Foore, unsuccessfully sought preliminary injunctions to retain or re-instate their leases — and hence to maintain their businesses — pending the trial of the action.

1. Did the Third Circuit Court of Appeals err in ruling that, in a Sherman Act case, the threatened destruction of an antitrust plaintiff's business does not constitute "irreparable harm" for purposes of granting a preliminary injunction.

2. Did the Court of Appeals also err in ruling that Clayton Act § 16 does not grant the federal courts the power to enter an injunction which requires an antitrust defendant to continue supplying only the "tying" product — here real estate and equipment leases — but not the "tied" products, in order to preserve the antitrust plantiff's business.

3. Even if the destruction of an antitrust plaintiff's business does not, standing alone, constitute irreparable harm, did Petitioners nevertheless make a showing of irreparable harm by establishing that they needed to run their businesses for *evidentiary* reasons — *i.e.*, to help them quantify their antitrust damages under Clayton Act § 4, to help them develop evidence going to the merits, and to prevent the intimidation of potential witnesses and members of the alleged franchisee class.

PARTIES

With one exception, all parties hereto are listed in the caption. The one exception is Mr. Guy Moderelli. Mr. Moderelli is a former Country Fair franchisee who intervened as a named plaintiff and as a class representative in March of 1995.

Mr. and Mrs. Young and Mr. Foore — the Petitioners herein — and Mr. Moderelli are individuals and are not incorporated.

Country Fair, Inc. ("Country Fair") is privately owned. Meadow Brook Dairy Company is a subsidiary of Dean Foods, Incorporated, a publicly-traded corporation. The other defendants are all individuals.

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OFFICIAL REPORTS OF OPINIONS IN THE CASE

There are no official reports of opinions in the case. The unreported opinions in the case which are pertinent to this Certiorari Petition have been reprinted in the Appendix hereto.

JURISDICTION OF THIS COURT

The Court of Appeals issued its Memorandum Opinion and Judgment on April 6, 1995. Sup. Ct. App. at A-1. A timely Petition for Rehearing In Banc was filed under both Fed. R. App. P. 35(b) and 40. The Court of Appeals issued its Order denying the Petition for Rehearing on May 5, 1995. Sup. Ct. App. at A-22. Accordingly, the time for filing this Petition for Certiorari commenced running on May 5, 1995. Sup. Ct. R. 13.4. This Court has jurisdiction hereof pursuant to 28 U.S.C. § 1254(1).

At one point, Mr. Foore was concerned that his appeal to the Third Circuit might become moot, and he sought a stay pending appeal. Country Fair opposed Mr. Foore's application for a stay on the ground that Mr. Foore's appeal could not become moot because he filed his Notice of Appeal on July 25, 1994, one day *before* Country Fair's notice of franchise and lease termination took effect. In arguing that mootness was not a concern, Country Fair relied on *Bateman v. Ford Motor Co.*, 302 F.2d 63 (3d Cir. 1962). In *Bateman*, the Third Circuit held that it "retain[ed] jurisdiction" over a franchise termination dispute because "the appeal from the denial of the injunction was brought before the termination date." *Id.* at 65, citing *Porter v. Lee*, 328 U.S. 246, 66 S. Ct. 1096 (1946). In apparent reliance on this argument, the Third Circuit denied Mr. Foore's Motion for a Stay, and Country Fair did not challenge the Third Circuit's jurisdiction over Mr. Foore's appeal seeking reinstatement of his real estate and eqipment leases. Once it is established that the Third Circuit had jurisdiction over the dispute between Country Fair and Mr. Foore, the Supreme Court also has jurisdiction over the dispute pursuant to 28 U.S.C. § 1254(1).

The Youngs' appeal has not presented any mootness issues. In addition, other Country Fair franchisees are similarly situated. They may ultimately participate in the suit as class members if the District Court grants Petitioners' pending Motion for Class Determination. *See United States Parole Commission v. Geraghty*, 445 U.S. 388, 100 S. Ct. 1202 (1980).[1]

THE STATUTES AND THE FEDERAL RULE INVOLVED

This Petition involves Sherman Act § 1, 15 U.S.C. § 1, which provides in pertinent part as follows:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal . . .

This Petition also involves Clayton Act § 4, 15 U.S.C. § 15, which provides in pertinent part as follows:

> . . . [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee. . . .

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[1] A former Country Fair franchisee — Guy Moderelli — intervened in the action in March of 1995. Because he was a terminated franchisee and because the District Court had already denied the preliminary injunction motions filed by the Youngs and Mr. Foore, Mr. Moderelli has not sought preliminary injunctive relief. However, Mr. Moderelli is seeking *permanent* equitable relief which would require Country Fair to reinstate the real estate and equipment lease components of his terminated franchise agreement.

This Petition also involves Clayton Act § 16, 15 U.S.C. § 26, which provides in pertinent part as follows:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue . . . .

This Petition also involves Fed. R. Civ. P. 65, which provides in pertinent part as follows:

> Rule 65. Injunctions.
>
> (a) PRELIMINARY INJUNCTION
>
> (1) *Notice.* No. preliminary injunction shall be issued without notice to the adverse party.
>
> * * *
>
> (b) A temporary restraining order may be granted . . . only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant . . . .

STATEMENT OF THE CASE

This case involves minimum resale pricefixing and "aftermarket" tying claims brought by franchisees against their franchisor, Country Fair, Inc. ("Country Fair"). Country Fair operates a chain of approximately 80 convenience stores, all of which sell groceries and many of which also sell gasoline. The

stores, many of which are now company-owned, are located in Pennsylvania, Ohio and New York.

Petitioners allege that Country Fair has used its control over the real estate and equipment at franchised sites to force Petitioners to purchase over-priced and inferior quality merchandise. Foore J.A. at 32-33. Specifically, Petitioners claim that the "tying" product includes "the real estate lease agreements, ownership of the gasoline tanks and equipment, duplicate sets of keys, and judicial and extrajudicial takeovers of sites." Young J.A. at 1339. In addition to forcing franchisees to *purchase* overpriced groceries at the wholesale level, Country Fair also used its control over franchised sites as a mechanism for forcing franchisees to *sell* groceries at retail prices dictated by Country Fair. For example, a Country Fair franchise representative told Mr. Foore that "Country Fair would take [his] store from [him]" if he continued attempting to "discount" his retail price below the retail prices dictated by Country Fair. Foore J.A. at 224.

Once a franchisee has made his or her initial investment to purchase the franchise — and has invested years of his or her life building up a going-concern business at the site — franchisees have a strong economic incentive to succumb to Country Fair's dictates, rather than lose their store. Thus, Country Fair's ultimate control over the real estate (and the equipment at the site) creates a post-contractual "aftermarket" in which Country Fair has market power in the "tying" product — *i.e.*, the real estate and equipment leases. *See Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 112 S. Ct. 2072 (1992).

Country Fair has two types of franchise agreements — the 100% Franchise Agreement and the 50/50 Franchise Agreement. The Youngs had a 100% Franchise Agreement, and Mr. Foore had a 50/50 Franchise Agreement. However, the differences between the two types of agreements relate to the franchise fee applicable to groceries. With regard to gasoline, all

franchisees are subject to an identical "Gasoline Addendum." *See* Young J.A. at 1253.1, 1118-50, 1152-53; Foore J.A. at 244-54, 255.

The Youngs were Country Fair franchisees from 1986 until 1993, when they filed suit. Currently, the Youngs are still in business at their former franchise site in New Castle, Pennsylvania (the "New Castle Site"), but they are selling only groceries, not gasoline, because Country Fair has placed locks on the gasoline pumps.

Mr. Foore was a Country Fair franchisee from 1989 until July of 1994 at a store in Wheatland, Pennsylvania (the "Wheatland Site"). Mr. Foore was forced out of the Wheatland Site last summer when Country Fair obtained a Writ of Seizure which enabled Country Fair to place chains and locks on the coolers and refrigerators at the Wheatland Site. Since then, Mr. Foore has been working as a clerk in a grocery store during the day and as a bartender at night.

The Youngs and Mr. Foore brought their claims individually and as class representatives. The Class Determination Motion has been filed and briefed, but it has not yet been decided by the District Court.

An unusual feature of the Country Fair franchise system is that Country Fair, not the franchisees, controls 100% of the revenues generated at each franchisee site. Thus, each business day, every franchisee is required to deposit 100% of his or her gross receipts for groceries and gasoline into an "Open Account" controlled by Country Fair. Country Fair then purports to do the accounting. Foore J.A. at 215-16, 222-23; Young J.A. at 1242-46. A central theme of this litigation is that Country Fair has used its control over franchisee revenues and accounting records to assist Country Fair in its ongoing efforts to implement antitrust violations both at the retail level (in the form of minimum resale pricefixing) and at the wholesale level (in the form of illegal overcharges for wholesale product). Petitioners also

have pendent state law claims alleging fraud, breaches of fiduciary duty and accounting irregularities.

The principal focus of the equitable relief sought by the Youngs and Mr. Foore has been an effort to hold onto their businesses — in which Mr. Young and Mr. Foore have invested years of effort — while at the same time disentangling themselves from the illegal aspects of the Country Fair franchise system. However, because the Country Fair franchise system gives Country Fair such extensive control over franchisee revenues, franchisee accounting, franchisee wholesale purchases, and franchisee retail pricing decisions, both Mr. Foore and the Youngs have sought equitable relief which would maintain *only* their continued ability to use and lease the real estate and equipment at their store sites. In short, they have both sought injunctions which would require Country Fair to continue supplying the "tying" product to them, *i.e.*, the real estate and equipment previously leased or supplied to them by Country Fair

For example, Mr. Foore sought a prohibitory preliminary injunction which would have prevented Country Fair from terminating Mr. Foore's real estate sublease and equipment lease (which were components of the franchise agreement). Similarly, the Youngs initially sought a prohibitory temporary restraining order to prevent Country Fair from effectuating a forcible extra-judicial take-over of their store. Two days after the prohibitory temporary restraining order was denied, Country Fair did effectuate a forcible extra-judicial take-over of *half* of the Youngs' business — the gasoline half — and the Youngs then moved for a mandatory preliminary injunction to require Country Fair to unlock the gasoline tanks and lease them back to the Youngs. To date, however, Petitioners have been rebuffed in their attempts to obtain such equitable relief.[2]

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[2] The owners of the New Castle Site — Mr. and Mrs. Stephen Lefes — have supported the Youngs' effort. The Lefeses were upset with Country Fair's actions because the Lefeses felt that locking up the gasoline tanks was decreasing customer traffic at their shopping plaza and hence was hurting the

There are three principal antitrust violations that are pertinent to this Petition — vertical pricefixing claims relating to gasoline, vertical pricefixing claims relating to groceries and tying claims. These antitrust claims are discussed briefly below.

With regard to gasoline, all Country Fair franchisees — regardless of whether they are 100% franchisees or 50/50 franchisees for purposes of grocery sales — are subject to a standard "Gasoline Addendum." *See* Young J.A. at 1152-53, Foore J.A. at 255.[3] Under the Gasoline Addendum, it is undisputed that Country Fair has a written contractual right to set the retail price of gasoline sold by the Country Fair franchisees. *See* Young J.A. at 1248-49 and at 1152-53. Country Fair has attempted to defend this practice by contending that it "owns" the gasoline. However, it is clear that the Youngs have all the "indicia" of ownership. *See* Young J.A. at 1248-49. For example, the Youngs paid 100% of the ground rent on the premises, 100% of the labor, 100% of the utilities, and 100% of all other site-specific costs. Country Fair's sole expense regarding gasoline was its initial investment in the gasoline tanks, but even this initial investment was ultimately funded by the Youngs because the depreciation on the equipment (plus repairs and maintenance on the equipment) was subtracted out of the gross gasoline sales generated by the Youngs prior to the split of gross gasoline

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Lefeses and their other tenants in the plaza. *See* Young J.A. at 1540-94 (Lefes Affidavit) and at 1536-39 (Declarations of other tenants). In addition, the Lefeses are leasing the New Castle Site directly to the Youngs on a month-to-month basis (over Country Fair's objection), and the Lefeses are suing Country Fair in ejectment and for trespass to force Country Fair to remove its gasoline equipment from the site (which Country Fair refuses to do). Meanwhile, Country Fair claims to have a lease from the Lefeses and is suing the Youngs for ejectment. All of these suits are currently before the same District Court Judge who has been assigned to this antitrust class action.

[3] Mr. Foore did not sell gasoline at his site because it was not large enough to accommodate gasoline tanks. However, the Gasoline Addendum

profits between Country Fair and the Youngs (with 75% of the profits going to Country Fair and 25% of the profits going to the Youngs). *See* Young J.A. at 1152-53. Hence, the Youngs contend that Country Fair is engaged in unlawful vertical price-fixing. *See Simpson v. Union Oil Co.*, 377 U.S. 13, 84 S. Ct. 1051 (1964); *Kellam Energy, Inc. v. Duncan*, 668 F. Supp. 861, 886 (D. Del. 1987).

Regarding groceries, the vertical pricefixing claims of Mr. Foore and the Youngs present the mirror image of the gasoline claims. Thus, Country Fair concedes that the franchisees own their groceries, but Country Fair disputes that it sets the retail price of groceries sold by its franchisees. However, there is ample evidence in the record in the form of affidavits filed by Mr. Young and Mr. Foore that they were forced to adhere to Country Fair's retail price schedule for groceries. *See* Foore J.A. at 224 and Young J.A. at 1250. *See Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 110 S. Ct. 1884 (1990).

Mr. Foore and the Youngs have also asserted "aftermarket" tying claims, alleging that they were forced to purchase over-priced and inferior quality products directly from Country Fair and from vendors designated by Country Fair who paid rebates to Country Fair (including Meadow Brook Dairy, which was formerly an "affiliate" of Country Fair). *See* Foore J.A. at 64, 224-25 and Young J.A. at 1250-52. Petitioners claim that a post-execution contractual "aftermarket" existed once they had purchased their franchises from Country Fair — which included the related leases — and invested their time and effort in building up their businesses at a particular site. *See Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 112 S. Ct. 2072 (1992). There is substantial case law to support the proposition that a real estate lease can form part of the "tying" product in a franchise context. *See Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 453-54 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978).

Country Fair's control over franchisee revenues via the franchisee "Open Accounts" gave it an increased ability to effectuate the antitrust violations discussed above. Taking the "tying" claims as an example, Mr. Young explained Country Fair's practices as follows:

> When I entered into my franchise agreement with Country Fair, I was led to believe that being a franchisee would enable me to purchase merchandise at prices lower than otherwise available because Country Fair would get volume discounts. In fact, this is exactly what the Offering Statement said. (*See* Exhibit A, Section 10.) In reality, Country Fair required me, as a practical matter, to purchase supplies from it and from approved vendors, and the prices charged by Country Fair and those vendors were often too high. At times, I was able to purchase supplies from other vendors for much less money. For example, I bought coffee cups on my own which cost much less — sometimes more than 50% less — than the cups from Country Fair. When Country Fair learned that I was doing this, they required me to stop using the less expensive cups and use their more expensive cups. (*See* Exhibit G.) In addition, sometimes I would receive shipments of merchandise that I did not request and did not want. Country Fair required that I accept and sell the merchandise. For example, I was forced to buy short-dated film from the Country Fair warehouse because Country Fair had a "surplus" that it needed to sell to someone. (See Exhibit H.) Similarly, I was required to buy short-dated milk (which could not be sold once the expiration date was reached) and over-priced dairy products from Meadow Brook Dairy. Now that I am on my own, I get many more discounts from vendors than I got through Country Fair, even though I now buy in

> smaller volumes that [sic: than] Country Fair was buying. Also, I get higher quality products.

See Young J.A. at 1251. Similarly, Mr. Foore explained his predicament as follows:

> Country Fair refused to pay any vendor I tried to use. In fact, Country Fair would not pay even authorized vendors if I bought "unauthorized" products, for instance, Coke in 12 oz. cans. Now, I buy whatever Country Fair sends to my store, and Country Fair debits my Open Account for whatever price Country Fair says is the price.

See Foore J.A. at 224.

Petitioners also claim that Country Fair's accounting reports were so confusing that they were unable to ascertain the true status of their businesses. By way of example, in 1990, Mr. Young grossed approximately $1,037,882. However, it was not until Mr. Young retained an independent accountant that he learned that his net "profit" on sales of groceries and gasoline totaled a mere $155. *See* Young J.A. at 1244-45. Moreover, Mr. Young was working approximately 4,000 hours a year at his store (without being paid any salary from Country Fair). *See* Young J.A. at 1243. However, Country Fair continued to pay Mr. Young an $18,000 "draw against anticipated profits" even though the Youngs' profits — as calculated by Country Fair — were nowhere near $18,000 in 1990. As a result, the Youngs' "debt" to Country Fair increased dramatically. *See* Young J.A. at 1244-48.

Country Fair employed a similar approach regarding Mr. Foore. Mr. Foore is a high school graduate who invested his life savings — $10,000 — to acquire his Country Fair franchise. And he, too, was paid a "draw" that dramatically exceeded his "anticipated profits," thereby causing his so-called "debt" to

Country Fair to escalate rapidly as well. *See* Foore J.A. at 218-20.

The Youngs and Mr. Foore have alleged in their Complaints that they did not generate their "anticipated profits" at their stores due, in large part, to the pervasive antitrust violations detailed above (in combination with Country Fair's acts of fraud) — which affected franchise operations at both the retail and the wholesale level. Moreover, the Youngs and Mr. Foore have alleged that Country Fair *intentionally* allowed a large "debt" to be run up over a number of years so that — after the Youngs and Mr. Foore had invested years in the development of a going-concern business — Country Fair could use the "debt" as a mechanism to take over their businesses. Indeed, during the course of the preliminary injunction briefing, it became clear that Country Fair had no expectation of collecting the so-called "debt" allegedly owed by Mr. Foore. Thus, Mr. George Arthur, the President of Country Fair, stated in his Affidavit as follows:

> [D]ue to Mr. Foore's limited assets, it will be impossible for Country Fair to recover any debt it is owed by Mr. Foore.

See Foore J.A. at 174. Thus, there is strong evidence in the record that Country Fair uses franchisee "debt" as a mechanism to take over the franchise business.[4]

Obviously, once the Youngs and Mr. Foore became aware of Country Fair's illegal practices, one option available to them was to give Country Fair what it wanted, *i.e.*, to surrender their

annexed to his 50/50 Franchise Agreement was identical to the Youngs' Gasoline Addendum. *See* Foore J.A. at 255.

[4] Country Fair's Answer to Mr. Foore's Complaint contained no counterclaim to recover Mr. Foore's alleged "debt." *See* Foore J.A. at 96-114. Just recently, however, Country Fair filed a motion with the District Court seeking leave to amend the Answer to add a counterclaim for approximately $47,000.

businesses. If they did this, their only remedy would be for damages. However, the Youngs and Mr. Foore have invested many years of effort in building up their businesses. Accordingly, both Mr. Young and Mr. Foore have sought preliminary injunctive relief which would leave them in possession of their stores, operating under their own names (and free of the Country Fair franchise system and trademarks).

The Complaint was filed on January 4, 1993 in the District Court by Fred and Janet Young. *See* Young J.A. at 1025-1198. In essence, the Youngs alleged that the Country Fair franchise system is operated in an illegal manner, *e.g.*, because the franchise system encompasses ongoing antitrust violations and because the franchise system is permeated by fraud. *See* Young J.A. at 1025. At that time, Mr. Young took down the Country Fair signs, stopped using the Country Fair trademarks, and began doing business as Young's Deli. The Youngs also began paying rent for the property directly to the owners — Mr. and Mrs. Lefes. Young J.A. at 1378. The Youngs did so because the Lefeses did not believe that Country Fair had a valid lease for the New Castle Site. Rather, the Lefeses understood that the rental payments previously being made by Country Fair were coming out of the Youngs' "Open Account." Hence, the Lefeses — like any other third-party vendor who supplied the Youngs — viewed the Youngs as the contracting party. Country Fair, however, disagrees, and this issue is currently being litigated in the District Court. *See* note 2 on page 6, above.

On January 4, 1993 — the same day they filed their Complaint — the Youngs sought a temporary restraining order from the District Court to prevent Country Fair from effectuating a forcible takeover of the Youngs' convenience store in New Castle, Pennsylvania, where the Youngs were selling gasoline and groceries. *See* Young J.A. at 1199. The District Court denied the Youngs' application for a TRO on the grounds, *inter alia*, that merely because Country Fair had taken over other

franchisee stores in the past was not sufficient evidence that Country Fair would treat the Youngs similarly. *See* Young J.A. at 1217.

On January 6, 1993, Country Fair came to the Youngs' store and locked up the gasoline equipment and tanks, which Country Fair claims to own. As a result, the Youngs' gross revenues of approximately $1 million a year were cut in half. (The gasoline sales accounted for approximately 50 percent of the Youngs' total revenues.) *See* Young J.A. at 1240.

Because a "prohibitory" injunction was now moot, the Youngs twice sought a mandatory preliminary injunction from the District Court requiring Country Fair to unlock the gasoline tanks during the pendency of the litigation so that the gasoline half of the business could be preserved until trial. The Youngs further agreed to pay rent on the equipment during the pendency of the litigation. Young J.A. at 1241, 1378. The Youngs argued to the District Court that the gasoline business should be preserved regardless of who prevailed at a trial on the merits. Young J.A. at 1351.[5]

The District Court repeatedly rebuffed the Youngs' attempts to obtain a mandatory injunction unlocking the gasoline tanks, and the Youngs appealed to the Third Circuit. The Third Circuit affirmed the District Court.

On January 13, 1994, Mr. Foore intervened as a named and a representative Plaintiff in the antitrust class action suit which had been initiated in early 1993 by the Youngs. *See* Foore J.A. at 15 and 17. Just five days later, on January 18, 1994, Country Fair sent Mr. Foore a letter stating that Country Fair was termi-

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[5] The Youngs have been paying rent on the real estate directly to the owners of the property — Mr. and Mrs. Lefes — since January 1993. *See* Young J.A. at 1240. As discussed in note 2 above, the Lefeses are aligned with the Youngs in their effort to have gasoline sales resume at the New Castle Site.

nating Mr. Foore's franchise and the related real estate and equipment lease agreements, to be effective on 30-days notice. *See* Foore J.A. at 228.

In early February, Country Fair agreed to a stand-still agreement (equivalent to a temporary restraining order) conditioned upon Mr. Foore's agreement to an expedited briefing schedule. During the course of the expedited briefing schedule, Country Fair filed an Affidavit by its President, Mr. George Arthur. In his Affidavit, Mr. Arthur stated — wholly unexpectedly — that once Country Fair succeeded in terminating Mr. Foore's franchise, Country Fair intended "to permanently cease all operations" at the Wheatland Site. Mr. Arthur stated as follows in his sworn Affidavit dated February 17, 1994:

> Due to the continued loss of sales and profits at the Foore store, Country Fair intends to permanently cease all operations at this location. Country Fair cannot economically justify its continued subsidy of the losses at this location. Since there are five years remaining on the lease, Country Fair hopes to be able to sublease the premises to some other business to alleviate continuing losses.

See Foore J.A. at 174. Mr. Arthur quantified Country Fair's *claimed* losses at just over $168,000 for the years 1989-93. *See* Foore J.A. at 171, 213.

Based upon Country Fair's surprising and unexpected concession that it intended to "permanently" abandon operations at the Wheatland Site where Mr. Foore's Country Fair convenience store was located, Mr. Foore filed Reply Papers arguing as follows: Because Country Fair no longer wanted the Wheatland Site, the District Court should grant Mr. Foore a preliminary injunction permitting him to remain at the Wheatland Site as the *existing* sublessee of the real estate. This outcome would not have resulted in a significant *involuntary* change in the status quo since Mr. Foore was *already* a sublessee at the site. *See*

Foore J.A. at 222. *See also* Foore J.A. at 180 (Franchise Agreement Article 1). (Article 1 of the Franchise Agreement — which is quoted below at page 18 — provides that Mr. Foore has been the lessee of the real estate and the equipment at the Wheatland Site.) Rather, the only change in the status quo would be that Mr. Foore would no longer be operating under the existing Country Fair franchise system or trademarks; however, this was a change in the status quo which was *desired* by all parties. Indeed, Country Fair's unexpected concession provided the perfect opportunity to have Mr. Foore run the Wheatland Site completely free of *any* unlawful vertical restraints of trade imposed by Country Fair via the franchise agreement.

In his Reply Papers, Mr. Foore also disputed Mr. Arthur's contention that Country Fair was losing money at the Wheatland Site. Foore J.A. at 223, 225-26 (stating: "I need to run my own business between now and the trial in order to find out whether or not my business is really profitable or not. I think it is, and . . . that Country Fair has not been losing $45,000.00 a year at my store."). Mr. Foore stated under oath that he was willing to continue paying the rent as the existing lessee of the real estate and equipment and was also willing to pay all store-related expenses during the pendency of the litigation. *See* Foore J.A. at 222-26. Mr. Foore (like Mr. Young) was also willing to post a bond. Foore J.A. at 226; Young J.A. at 1378.

Notwithstanding Country Fair's announced intention to "permanently" abandon the Wheatland Site, the District Court denied Mr. Foore's Motion for a Preliminary Injunction which would have allowed him to remain as the existing sublessee at the Wheatland Site during the pendency of the litigation. In doing so, the District Court relied upon the Third Circuit's decision in *Frank's GMC Truck Center, Inc. v. General Motors Corporation*, 847 F.2d 100, 102 (3d Cir. 1988). *See* Sup. Ct. App. at A-15. Specifically, in reliance on *Frank's GMC Truck Center*, the District Court ruled that "[t]he only possible harm

resulting from the termination of the franchise agreement would be economic injury." Sup. Ct. App. at A-15.

The District Court applied an identical analysis to the Youngs' request for a mandatory preliminary injunction requiring Country Fair to unlock the gasoline tanks and lease them to the Youngs.[6] Thus, the District Court ruled as follows:

> Assuming *arguendo* that these assertions are true and that plaintiffs will suffer a loss of business and customers as a result of the gasoline equipment remaining locked, the harm flowing therefrom is purely economic and is compensable by money damages. As the Third Circuit has noted, "[t]he availability of adequate money damages belies a claim of irreparable injury." *Frank's GMC Truck Center, Inc. v. G.M.C.*, 847 F.2d 100, 102 (3d Cir. 1988) . . . .

See Sup. Ct. App. at A-20.

The Third Circuit affirmed. In doing so, it cited three times to the exact page from *Frank's GMC Truck Center* which had been relied upon by the District Court in denying the relief requested by the Youngs and Mr. Foore. *See* Sup. Ct. App. at A-6, A-8 and A-9.

THE REASONS FOR GRANTING THE WRIT

First, there is a conflict in the circuits as to whether the destruction of a business — particularly in the context of an antitrust case — constitutes irreparable injury. *See* Sup. Ct. R. 10.1(a).

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[6] It should be noted that the Youngs did not have a formal, separate lease agreement for the gasoline equipment. However, the Gasoline Addendum clearly granted the Youngs the right to use Country Fair's gasoline equipment. *See* Young J.A. at 1152-53. *See also* note 2, above.

Second, the Court of Appeals incorrectly interpreted the scope of the Clayton Act § 16 remedy. The federal courts *do* have the power to enter an injunction requiring an antitrust defendant to continue supplying the "tying" product — here, real estate and equipment leases — to an antitrust plaintiff. This is an important question of federal law which has not been, but should be settled by this Court. *See* Sup. Ct. R. 10.1(c).

Third, Petitioners established that the continued operation of their businesses would generate important evidence for use at trial. Hence, the destruction of their businesses by Country Fair prior to trial will effectuate the destruction of an important source of evidence to be used at the trial of this antitrust class action. Because both the District Court and the Court of Appeals failed to address this argument and because the preservation of evidence is an "accepted and usual course of judicial proceedings," Petitioners call on this Court to exercise "this Court's power of supervision." *See* Sup. Ct. R. 10.1(a).

I.

THERE IS A CONFLICT IN THE CIRCUITS AS TO WHETHER THE DESTRUCTION OF A BUSINESS CONSTITUTES IRREPARABLE HARM

As set forth above in the Statement of the Case, Mr. Foore has lost his entire business due to the District Court's failure to grant a preliminary injunction, and the Youngs have lost half of their business as a result of the District Court's failure to grant a preliminary injunction. Because Mr. Foore is facing the greater loss, the discussion below will focus principally on him. However, Mr. and Mrs. Young respectfully submit that the destruction of their gasoline business — which was generating approximately $500,000 a year in gross revenues — is subject to a similar analysis. Moreover, if Country Fair ultimately prevails in its litigation with the Lefeses — who own the site — regarding Country Fair's alleged status as a lessee of the site, Country Fair

will undoubtedly do to the Youngs exactly what Country Fair has already done to Mr. Foore — put the Youngs out on the street. Indeed, pending the outcome of Country Fair's litigation with the Lefeses (who own the property), Country Fair is seeking exactly this relief in the District Court in the form of an ejectment suit against the Youngs. See note 2, above.

Mr. Foore's franchise agreement with Country Fair contained three components. First, the franchise agreement authorized Mr. Foore to utilize the Country Fair name and franchise system. Second, the franchise agreement contained a real estate lease running from Country Fair to Mr. Foore. Third, the franchise agreement contained an equipment lease running from Country Fair to Mr. Foore. The real estate and equipment leases are set forth in Article 1 of the Franchise Agreement, which provides as follows:

> Country Fair hereby leases to Owners, and Owners hereby lease from Country Fair, upon the covenants and conditions and for the rental hereinafter set forth, the real property and improvements described in Exhibit A and the fixtures and equipment to be described in Exhibit B (or from time to time similar fixtures and equipment of like kind and quality) for a term to commence on the first day Owners open for business at said location and to end simultaneously with the termination of the Franchise as provided hereafter.

Foore J.A. at 244. The rental amounts for the real estate and the equipment are specified in Article 22 of the Franchise Agreement. *See* Foore J.A. at 253.

Country Fair gave notice of its intent to terminate the Franchise Agreement and the related real estate and equipment leases just five days after Mr. Foore intervened in this action. However, the actual terminations all took effect on or after July 26, 1994, which was one day after Mr. Foore filed his Notice of Appeal to the Third Circuit. Because the lease terminations took

effect at least 24 hours *after* Mr. Foore filed his Notice of Appeal on July 25, 1994, both the Third Circuit and this Court have "jurisdiction" over the dispute. *See* discussion above at pp. 1-2.

Mr. Foore and Country Fair both *want* to terminate the "franchise" portion of the franchise relationship (including termination of Mr. Foore's use of the Country Fair trademarks). Thus, the only remaining issue is whether there are any circumstances under which Mr. Foore can be permitted to retain the real estate lease and equipment lease, even though the franchise portion of the parties' relationship is over. Moreover, this question must be answered in the context of Country Fair's sworn admission that Country Fair has no interest in operating the site itself. Rather, Country Fair is only looking for a lessee of the premises willing and able to pay the rent. Foore J.A. at 174. Here, it is undisputed that Mr. Foore has always been willing to continue paying the rent for the premises (and for the equipment located on the premises). *See* Foore J.A. at 222-23.

In analyzing this claim, the Third Circuit concluded that, as a matter of law, Mr. Foore had no right to remain on the premises as the existing lessee of the property because "[t]he only possible harm resulting from the termination of the franchise would be economic injury." The Third Circuit reasoned as follows:

> Like the Youngs, Foore also cannot satisfy the immediate and irreparable injury requirement because he has an adequate remedy at law. If he succeeds in his antitrust and common law claims, he will be fully compensated with the damages that he will recover. The district court correctly noted that Country Fair's election to terminate Foore's franchise agreement will not impair the court's ability to grant an effective remedy. The only possible harm resulting from the termination of the franchise would be economic in-

> jury. *See Frank's GMC Truck Center*, 847 F.2d at 102.
>
> The district court was also correct in holding that Foore's alternative request that the court order the termination of the franchise agreement but permit him to stay on the premises and operate an independent store is untenable. Even if Foore succeeded on the merits of his claims, he would be entitled to damages and not the use of Country Fair's leasehold interests and equipment.

See Sup. Ct. App. at A-8.

In short, the Third Circuit ruled that Country Fair had a right to terminate the real estate and equipment leases because Mr. Foore could recover economic damages for the loss of his ability to continue doing business at the Wheatland Site. In essence, the Court of Appeals ruled that the destruction of a business does not constitute irreparable harm. Indeed, the Third Circuit so summarized its ruling:

> [T]he only potential injury which Foore might suffer is lost business, i.e., economic injury. As we have stated, economic injury can be fully redressed by damages and does not constitute irreparable harm.

See Sup. Ct. App. at A-9.

The fatal flaw in the Third Circuit's analysis is that every business in the United States could be similarly characterized — people run businesses in order to make money. But it does not necessarily follow that losing one's business is a purely economic injury as to which no equitable relief can be pursued. Rather, the destruction of one's business does constitute irreparable harm, as numerous other courts of appeal have recognized.

The leading case in this area is *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197 (2d Cir. 1970). In *Semmes*, the Second Circuit reasoned as follows:

> The right to continue the business in which William Semmes has engaged for 20 years and into which his son had recently entered is not measurable entirely in monetary terms; the Semmes want to sell automobiles, not to live on the income from a damage award.

429 F.2d at 1205. Numerous other courts have followed the reasoning of the *Semmes* case or have cited it with approval. *See Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum*, 990 F.2d 25, 27 (1st Cir. 1993) (noting that "courts possess the power to issue a business preserving injunction, at least where a future damage remedy may prove inadequate") (dictum) (Breyer, J.); *Engine Specialties, Inc. v. Bobardier Ltd.*, 454 F.2d 527, 530-31 (1st Cir. 1972); *Federal Leasing, Inc. v. Underwriters at Lloyd's*, 650 F.2d 495, 499-501 (4th Cir. 1981); *Roland Machinery Co. v. Dresser Industries, Inc.*, 749 F.2d 380, 386 (7th Cir. 1984); *Milsen Co. v. Southland Corp*, 454 F.2d 363 (7th Cir. 1971); *Ryko Manufacturing Co. v. Eden Services*, 759 F.2d 671, 673 (8th Cir. 1985); *Foremost Int'l Tours, Inc. v. Qantas Airways, Ltd.*, 379 F. Supp. 88 (D. Hawaii 1974), *aff'd*, 525 F.2d 281 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976). Indeed, the District Court in *Foremost* reasoned that the *Semmes* rule was particularly applicable in antitrust cases:

> [C]ourts should be particularly concerned with threats to the existence of a moving party's business in the area of antitrust. An award of only money damages in lieu of preserving a competitor disserves the public interest.

Foremost, 379 F. Supp. at 97.

In reliance on *Semmes*, the Seventh Circuit has expressly recognized that antitrust defendants should not be permitted to terminate contractual relationships — including "leases" — with antitrust plaintiffs when the terminations would help the antitrust defendants to effectuate their anticompetitive practices. As the Seventh Circuit has held:

> Many courts have held that defendants who are or may be guilty of anticompetitive practices should not be permitted to terminate franchises, leases or sales contracts when such terminations would effectuate those practices.

Milsen Company v. Southland Corporation, 454 F.2d 363, 366 (7th Cir. 1971). *See also* cases collected and cited in *Vendo Company v. Lektro-Vend Corporation*, 433 U.S. 623, 646 n.3, 97 S. Ct. 2881, 2895 n.3 (1977) (dissenting opinion).

The authority of Judge Friendly's decision in *Semmes* is so overwhelming that even the Third Circuit has cited it with approval in dictum. *See Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 803 (3d Cir. 1989). However, the Third Circuit did not follow *Semmes* here. Instead, the Third Circuit followed its holding in *Frank's GMC Truck Center, Inc. v. General Motors Corp.*, 847 F.2d 100 (3d Cir. 1988), to which the Third Circuit cited on three occasions. *See* Sup. Ct. App. at A-6, quoting the following language from *Frank's GMC Truck Center*:

> [A] purely economic injury, compensable in money, cannot satisfy the irreparable injury requirement.

Frank's GMC Truck Center, 847 F.2d at 102. *See also* Sup. Ct. App. at A-8 and A-9 (also citing to p. 102 of *Frank's GMC Truck Center*).

The fact that the Third Circuit has cited to *Semmes* with approval in dictum does not eliminate the conflict in the circuits that is present here. When the actual *holdings* of the various courts of appeal are compared, it is clear that the Third Circuit is out of step with virtually every other court of appeals on the subject of whether a loss of a business, particularly in an antitrust case, constitutes irreparable harm.

II.

THE COURT OF APPEALS ERRED IN RULING THAT CLAYTON ACT § 16 DOES NOT GRANT FEDERAL COURTS THE POWER TO ORDER AN ANTITRUST DEFENDANT TO CONTINUE SUPPLYING THE "TYING" PRODUCT TO AN ANTITRUST PLAINTIFF

In order to prevail in the courts below, Petitioners have to do more than convince this Court that the decision below is in conflict with the *Semmes* rule. That is so because this case differs from *Semmes* in one key way — here, Petitioners, unlike Mr. Semmes, do not want the *entire* franchise restored. Rather, Petitioners only want *part of* the franchise restored. Specifically, Petitioners seek equitable relief which will require Country Fair to continue supplying real estate leases and/or equipment, which Petitioners claim are the "tying" product in a post-contractual "aftermarket." *See* pages 8-9 above discussing this Court's recent *Eastman Kodak* decision. Thus, the question presented is whether Clayton Act § 16 allows a federal court to sever an illegal tying arrangement so that only the "tying" product, but not the "tied" product, continues to be supplied by the antitrust defendant to the antitrust plaintiff.

The Court of Appeals answered this question in the negative, stating:

> Even if Foore succeeded on the merits of his claims, he would be entitled to damages and not to the use of Country Fair's leasehold interests and equipment.

Sup. Ct. App. at A-8. *See also id.* at A-9, (stating that Mr. Foore's request to maintain his leases so that he could operate independently was "specious"). Thus, the Court of Appeals ruled, *as a matter of law*, that even a *prevailing* antitrust plaintiff cannot obtain a Clayton Act § 16 injunction which would require an antitrust defendant to continue supplying the "tying" compo-

nent of a contract which also contains illegal "tied" components. Petitioners submit that this is an overly narrow interpretation of the scope of Clayton Act § 16.

The equitable relief sought here by the Youngs and Mr. Foore clearly falls within the power of the federal courts under Clayton Act § 16. Clayton Act Section 16 has three primary purposes: "(1) putting an end to the illegal conduct, (2) depriving violators of the benefits of their illegal conduct, and (3) restoring competition in the marketplace." *In re Multidistrict Vehicle Air Pollution*, 538 F.2d 231, 234 (9th Cir. 1976). The preliminary injunctions requested here would further all of these purposes — Country Fair could not control Petitioners' purchasing decisions (at wholesale) or pricing decisions (at retail). Country Fair would be deprived of the opportunity to take control of the Wheatland Site or the New Castle Site. Finally, Mr. Young and Mr. Foore would be allowed to compete freely in the marketplace. The District Court's ruling, however, has eliminated the District Court's power "to do equity and to mould [the final] decree to the necessities of the particular case." *California v. American Stores Co.*, 495 U.S. 271, 295 110 S. Ct. 1853, 1866 (1990), quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329, 64 S. Ct. 587, 592 (1944).

In interpreting Clayton Act § 16 it is important to recognize that § 16 authorizes issuance of injunctions "when and under the same conditions and principles as injunctive relief . . . is granted by courts of equity." Moreover:

> It has long been the law that courts of equity have the power to reform a written instrument where there has been a showing of fraud, accident or mistake.

Kutsenkow v. Kutsenkow, 414 Pa. 610, 202 A.2d 68 (1964). Thus, the District Court had the power under Clayton Act § 16 and Federal Rule of Civil Procedure 65 to sever out the illegal aspects of the "tying" contract and to order continued performance of only the legal aspects of the contract.

III.

BECAUSE PETITIONERS HAVE SHOWN THAT THEY NEED TO RUN THEIR BUSINESSES FOR *EVIDENTIARY* REASONS, THAT SHOWING PROVIDES AN INDEPENDENT BASIS FOR A FINDING OF IRREPARABLE HARM

As discussed above, Mr. Foore argued that the destruction of all of his business constituted irreparable harm and Mr. Young argued that the destruction of half his business constituted irreparable harm. In addition, however, both Mr. Foore and Mr. Young argued to the District Court and the Third Circuit that they needed to run their businesses prior to trial for evidentiary reasons. As explained in Mr. Young's Affidavit:

> Separate and apart from my desire to keep my business up and running prior to trial, I need to run my whole business (including gasoline) prior to trial to generate accurate accounting evidence. I need to know whether my store can be run profitably as a single economic unit. This evidence will help me establish my antitrust and fraud claims against Country Fair. In addition, if my store can be run profitably, I need to know the amount of profits so that damages can be computed in this case. I need to generate this information independently in order to insure that the information is accurate.

See Young J.A. at 1377-78. Mr. Foore's Affidavit also made this point expressly:

> I feel that I need to operate my own store until the trial in this case in order to keep my business and my customer relations intact until trial. I also believe that I need to run my own business between now and the trial in order to find out whether or not my business

> is really profitable or not. I think that it is, and I believe that I am going to be able to prove that Country Fair has not been losing $45,000.00 a year at my store. In other words, I believe that I can prove that the accounting information in Mr. Arthur's Affidavit is wrong. But, unless this Court allows me to run the store, I will not have an opportunity to generate the profit and loss information I need to prove the merits of my antitrust claims and my fraud claims and to prove damages.

Foore J.A. at 225-26. The need for Mr. Young and Mr. Foore to generate their own accounting information — independent of Country Fair — is particularly acute in this case because, when they were franchisees, Country Fair exercised exclusive control over the stores' gross receipts and accounting information. *See* Foore J.A. at 215-16, 218, 224-25, Young J.A. at 1034-38, 1242-46.

In briefs filed with both the District Court and the Third Circuit, the Youngs and Mr. Foore cited a case which had granted a preliminary injunction under circumstances virtually identical to those present here. *See Bascom Food Prods. Corp. v. Reese Finer Foods, Inc.*, 715 F. Supp. 616, 640 (D.N.J. 1989) (recognizing "that the standard for demonstrating irreparable harm is a difficult one in the Third Circuit" but nevertheless granting preliminary injunction where "plaintiffs ha[d] demonstrated an inability to prove the likely amount of lost profits"). The case presented here is, if anything, stronger than the one presented in *Bascom Food*. What is unusual about the present case — at least as regards Mr. Foore — is that the antitrust defendant *alleges* that the Wheatland Site formerly operated by Mr. Foore is *unprofitable*. But Mr. Foore believes he can prove otherwise if he can run the site by himself. Thus, allowing Mr. Foore to operate the Wheatland Site would not merely enable him to establish the amount of his lost profits; under Clayton

Act § 4; rather, it would also help him establish antitrust *liability*. Indeed, proof of the "fact of damage" is an element of the plaintiff's liability case under Clayton Act § 4. *See Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 454-55 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978). Similarly, even though Country Fair has not filed an affidavit stating that the Youngs' Site has been unprofitable to Country Fair, Mr. Young will be in a substantially improved posture to prove his antitrust claims if he is permitted to operate the entire New Castle Site — and not just half of it — prior to trial so that he can compare his operations independent of the Country Fair system to the operations prior to initiation of the suit. The need for this evidence is particularly acute here because, at all relevant times, Country Fair controlled the accounting while the Youngs and Mr. Foore were Country Fair franchisees.

Supreme Court Rule 10.1(a) permits a petitioner in this Court "to call for an exercise of this Court's power of supervision" when a lower court has "departed from the accepted and usual course of judicial proceedings . . . ." There is perhaps no element of a judicial proceeding more critical than the availability of evidence. Country Fair's actions here have shut off Petitioners from access to important documentary and accounting evidence regarding the profitability of their businesses.

Finally, the timing of Country Fair's notice of termination sent to Mr. Foore is also having a significant impact on another form of evidence in this case. Country Fair sent Mr. Foore his notice of termination *a mere five days after he intervened in this action* as a named class representative. That notice of termination sent a very clear message from Country Fair to each and every other *existing* franchisee who might have some thought of participating in this litigation either as a party or as a witness, to wit: you, too, can be put out on the street. Similarly, when the District Court failed to grant Mr. Foore his requested preliminary injunction, the District Court sent an equally clear

message to the franchisees — if you become involved in this lawsuit, and Country Fair retaliates against you, do not expect any "equity" protection from the federal court system. *Compare Bergen Drug Co v. Parke, Davis & Co.*, 307 F.2d 725, 728 (3d Cir. 1962) ("The point [this antitrust] plaintiff convincingly makes is that it will be unable to secure the cooperation of other wholesalers and of retailers to be witnesses because they fear the same sort of retaliatory action that plaintiff has experienced. Certainly, a court can act where a party's conduct is calculated to frustrate litigation.").

In sum, these *evidentiary* concerns provide an alternative basis for a finding of irreparable harm here.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that their Petition for Certiorari be granted.

Respectfully submitted,

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Not for Publication

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-3392

FRED YOUNG and JANET YOUNG, d/b/a YOUNG'S DELI and formerly d/b/a COUNTRY FAIR STORE NO. 90, on behalf of themselves and all others similarly situated; JAMES FOORE, d/b/a COUNTRY FAIR STORE NO. 87, on behalf of himself and all others similarly situated

v.

COUNTRY FAIR INC.; MEADOW BROOK DAIRY COMPANY; RAYMOND L. MCGARVEY; KEITH MCGARVEY; GEORGE ARTHUR; GERALD GARCIA

FRED and JANET YOUNG (The "Youngs"), JAMES FOORE ("Mr. Foore"),

Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

(D.C. No. 93-cv-00002)
District Judge: Hon. Gustave Diamond

Submitted Pursuant to Third Circuit LAR 34.1(a)
March 28, 1995

BEFORE: MANSMANN, COWEN and LEWIS, Circuit Judges

(Filed April 6, 1995)

MEMORANDUM OPINION

COWEN, *Circuit Judge.*

This is an appeal of the denial of motions for preliminary injunction by two former Country Fair, Inc. franchisees, Fred and Janet Young (the "Youngs") and James Foore. The Youngs unilaterally terminated their franchise agreement and then sought an injunction requiring Country Fair to unlock its gasoline equipment at the franchise site in order to enable the Youngs to dispense and sell gasoline, pending trial. Foore moved for an injunction requiring Country Fair to continue its franchise relationship with him pending trial. Alternatively, Foore seeks an order that terminates the franchise relationship but allows him to remain on the premises of his former franchise and use Country Fair's leasehold and equipment, pending trial.

Because the district court's denial of both the Youngs' and Foore's motions for preliminary injunctions was not an abuse of discretion, an error of law or a mistake in considering the proof, we will affirm the orders of the district court.

I.

Country Fair is a franchisor of convenience food stores. The Youngs operated their Country Fair franchise in New Castle, Pennsylvania. They also operated gasoline dispensing equipment on the premises, which are owned by Country Fair. The Youngs had a "100% Franchise Agreement" with Country Fair, pursuant to which the Youngs received 100% of the profits from grocery sales and Country Fair received a franchise fee equal to four and one-half percent of the gross revenues. Country Fair received 75% of the profits from the sale of gasoline and the Youngs received 25%. The Youngs claim that Country Fair coerced them to adhere to a "suggested" retail price scheme for the grocery goods, and dictated the retail price of gasoline. The Youngs further contend that they were forced to purchase over-

priced and inferior quality goods. Rather than receiving a salary, the Youngs received a "draw against anticipated profits" and throughout the years they become increasingly indebted to Country Fair. They claim that they were earning only a small share of the profits because of a skewed allocation of costs. Country Fair denies these allegations.

The Youngs maintain that they unilaterally and without notice terminated the franchise agreement in response to Country Fair's threat to cease paying the draw. On January 4, 1993, the Youngs filed a complaint against Country Fair asserting twenty-seven causes of action alleging, *inter alia,* antitrust violations, fraud, conversion, and breach of contract. The antitrust complaint alleges that the franchise arrangement was inherently fraudulent and that Country Fair perpetuated the alleged violations to enhance the fraudulent nature of the arrangement.

After terminating the franchise agreement, the Youngs ceased using the Country fair trademark and began doing business as "Young's Deli" on the premises. They also continued to use Country Fair's gasoline equipment and sold Country Fair's gasoline from January 4, 1993 to January 7, 1993. Country Fair placed locks on the gasoline pumps, without a court order, in order to prevent the Youngs from selling its gasoline. Country Fair thereafter commenced an ejectment suit against the Youngs. The Youngs filed a motion for mandatory preliminary injunction requesting that the district court order Country Fair to permit the Youngs to use and operate the gasoline equipment during litigation. The district court denied the motion, finding there was no irreparable harm since the only harm was speculative economic loss. *Young v. Country Fair,* C.A. No. 93-2 (W.D. Pa. January 10,1994) (order denying preliminary injunction).

Foore was also a Country Fair franchisee, with premises located in Wheatland, Pennsylvania. His franchise agreement

was different from that of the Youngs, providing for Country Fair and Foore to split the gross profits at the store on a 50/50 basis. Either party could terminate the agreement with thirty-days notice. Country Fair owned the equipment, rented the premises, and paid for utilities and repairs. In lieu of a salary, Country Fair paid Foore a "draw against anticipated profits." If anticipated profits did not materialize, the draw was treated as a loan at 12% interest. Like the Youngs, Foore claims that Country Fair controlled the retail prices, and forced Foore to buy inferior products at high prices. He claims that in handling the accounting, Country Fair allocated a substantially larger share of the costs to Foore's 50% share of the gross profits.

Sales declined in 1990 and 1991. According to Foore, the franchise agreement as written was intended to cause the franchisee to lose money (i.e., earn less than the draw), thereby putting the franchisee in debt and giving Country Fair control over the operation of the franchise. He claims that the agreement was skewed towards Country Fair, in that Country Fair could manipulate the terms to slow or eliminate the rate at which the franchisee became further indebted. Country Fair contends that it made accommodations to assist Foore and agreed to absorb some of his losses.

In January of 1994, Foore filed a complaint in intervention to join as a named plaintiff in the Youngs' antitrust action. Thereafter, Country Fair terminated the franchise agreement with Foore, effective with thirty-days notice. In February of 1994, Foore filed a motion for preliminary injunction, seeking an order either: (1) protecting him against the termination of this franchise agreement; or (2) terminating his franchise agreement but permitting him to remain on the premises and operate a store independent of Country Fair and Country Fair's lease with a third-party landlord. Foore contends that he requested this second form of relief after learning that Country fair intended to permanently cease all operations at the Wheatland site. He

states that he was willing to pay rent and all store-related expenses during the pendency of the litigation. In February 1994, the Youngs also filed a motion for reconsideration of the district court's prior denial of their motion for preliminary injunction.

On July 14, 1994, the district court denied Foore's motion for a preliminary injunction and the Youngs' motion for reconsideration. *Young and Foore v. Country Fair,* C.A. No. 93-2 (W.D. Pa. July 14, 1994) (order denying motion to dismiss and motion for reconsideration). In denying the Youngs' motion, the district court referred to its Opinion and Order dated January 10, 1994. The district court denied Foore's motion, finding he had not demonstrated immediate and irreparable harm since his losses were solely economic.

The district court denied Foore's motion to stay pending appeal. We similarly denied two motions for a stay pending appeal, and Foore's motion for an expedited appeal. Country Fair also filed a replevin action in the Pennsylvania state court to recover possession of all its equipment on the Wheatland site. The state court issued a writ of seizure permitting the Sheriff to enter the premises and seize, secure and padlock all of Country Fair's equipment on the premises. These appeals followed.[1]

---

[1] We note that the Youngs' appeal of the district court's order denying their motion for consolidation of Civil Actions Nos. 93-2 and 93-315, has been dismissed by this court for want of jurisdiction. *Young and Young v. Country Fair,* Nos. 94-3392 & 94-3407 (3d Cir. November 4, 1994) (dismissing No. 94-3407 for want of jurisdiction).

II.

A preliminary injunction is granted for the purposes of maintaining the status quo during litigation. The party moving for the injunction bears the burden of establishing (1) a probability of irreparable harm, and (2) a likelihood of success on the merits. Additionally, the district court should consider (3) the effect of the issuance of the preliminary injunction on other interested persons, and (4) the public interest. *Campbell Soup Co. v. ConAgra, Inc.*, 977 F.2d 86, 90-91 (3d Cir. 1992).

A.

The district court denied the Youngs' motion for reconsideration of its order denying their motion for preliminary injunction for the reasons stated in its Opinion and Order dated January 10, 1994. In that order, the district court denied the Youngs' original motion for preliminary injunction because it found that the plaintiffs failed to meet their burden of showing an immediate and irreparable injury.

We have held that in order for a plaintiff to establish irreparable harm:

> [e]stablishing a risk of irreparable harm is not enough. A plaintiff has the burden of proving a "clear showing of immediate irreparable injury." The "requisite feared injury or harm must be irreparable — not merely serious or substantial," and it "must be of a peculiar nature, in that compensation in money cannot atone for it."

ECRI v. McGraw-Hill, Inc., 809 F.2d 223, 226 (3d Cir. 1987) (citations omitted). *See also Frank's GMC Truck Center, Inc. v. General Motors Corp.*, 847 F.2d 100, 102 (3d Cir. 1988) ("[A] purely economic injury, compensable in money, cannot satisfy the irreparable injury requirement.").

The district court found that, even assuming the Youngs' assertion that they would lose business if a preliminary injunc-

tion were not granted, the resulting harm would be purely economic and compensable by money damages. Moreover, the district court found the record devoid of any evidence that the Youngs would lose the goodwill that they had developed over the years.

We believe that the district court properly denied the Youngs' motion for preliminary injunction. We do not perceive that they are in danger of irreparable harm. Even if the Young's allegations of lost customer traffic were confirmed, any injury which were to result from the loss of customer traffic is purely economic. This reason alone is a sufficient basis to affirm the order of the district court. Moreover, the Youngs did not produce any evidence demonstrating an imminent danger of loss of their business. Their claim that a continued decrease in customer traffic *could* result in the loss of their business is, at best, a speculative and remote injury. As we stated in *Punnett v. Carter,* 621 F.2d 578 (3d Cir. 1980), "[t]he moving party on a motion for preliminary injunction bears the burden of demonstrating an *imminent* threat of irreparable harm." *Id.* at 586 (emphasis added). The Youngs failed to meet this burden. They produced no evidence demonstrating a current or imminent danger of loss of their business. "Mere assertions of dire economic effects cannot, without some concrete proof, meet the irreparable harm standard." *Coca-Cola Bottling Co. of Elizabethtown, Inc. v. Coca-Cola Co.,* 668 F. Supp. 906, 913 (D. Del 1987). The Youngs' assertion that they are in danger of losing their goodwill is similarly unsupported and lacking foundation.

Because we affirm the district court's denial of the Youngs' motion for reconsideration on the ground that the Youngs failed to establish a probability of irreparable harm, we need not address the Youngs' likelihood of success on the merits, or the other factors (the effect of the issuance of the preliminary injunction on other interested persons and the public interest)

that a district court considers in granting a preliminary injunction.

B.

Foore is seeking alternative forms of injunctive relief in his motion for preliminary injunction: (1) an order precluding the termination of his franchise agreement pending trial, or (2) an order terminating his franchise agreement, by permitting him to remain on the premises and operate a store independent of Country Fair.

Like the Youngs, Foore also cannot satisfy the immediate and irreparable injury requirement because he has an adequate remedy at law. If he succeeds in his antitrust and common law claims, he will be fully compensated with the damages that he will recover. The district court correctly noted that Country Fair's election to terminate Foore's franchise agreement will not impair the court's ability to grant an effective remedy. The only possible harm resulting from the termination of the franchise would be economic injury. *See Frank's GMC Truck Center,* 847 F.2d at 102.

The district court was also correct in holding that Foore's alternative request that the court order the termination of the franchise agreement but permit him to stay on the premises and operate an independent store is untenable. Even if Foore succeeded on the merits of his claims, he would be entitled to damages and not the use of Country Fair's leasehold interests and equipment.

We acknowledge Foore's argument that the district court erred in only focusing on Foore's rescission claim and in assuming Foore will elect the remedy of rescission if he proves an ongoing fraud. Foore argues that the district court incorrectly ignored the fact that he also had made several claims for equitable relief, and "apparently concluded that although Mr. Foore was free to pursue his antitrust damages claims, he was not free

to pursue any antitrust claims for injunctive relief. Foore Brief at 22.

Foore's assertions are erroneous. The permanent relief requested by Foore is irrelevant to the district court's determination of irreparable harm. If Foore were to succeed on the merits, the district court will be free to fashion whatever legal or equitable relief is warranted. However, the only potential injury which Foore might suffer is lost business, i.e., economic injury. As we have stated, economic injury can be fully redressed by damages and does not constitute irreparable harm. *See Frank's GMC Truck Center,* 847 F.2d at 102.

The termination of Foore's franchise agreement does not preclude the court from rescinding the agreement or declaring it unenforceable. Moreover, Foore's alternative request for modification and/or reformation of the agreement so that he could run a store independent of Country Fair is specious. Mere modification of the agreement would not enable him to run the store independent of Country Fair.

Because we will affirm the district court's order denying Foore's request for preliminary injunction based on Foore's failure to establish irreparable injury, we need not reach Foore's other arguments. Accordingly, we will affirm the order of the district court denying Foore's motion for preliminary injunction.

CONCLUSION

For the foregoing reasons, we will affirm the orders of the district court, denying the Youngs' motion for reconsideration and Foore's motion for preliminary injunction.

TO THE CLERK:

Please file the foregoing opinion.

/s/ Robert E. Cowen
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-3392

FRED YOUNG and JANET YOUNG, d/b/a YOUNG'S DELI and formerly d/b/a COUNTRY FAIR STORE NO. 90, on behalf of themselves and all others similarly situated; JAMES FOORE, d/b/a COUNTRY FAIR STORE NO. 87, on behalf of himself and all others similarly

v.

COUNTRY FAIR INC.;
MEADOW BROOK DAIRY COMPANY;
RAYMOND L. MCGARVEY; KEITH MCGARVEY;
GEORGE ARTHUR; ARTHUR GARCIA

FRED and JANET YOUNG (The "Youngs"),
JAMES FOORE ("Mr. Foore")

Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

(D.C. NO. 93-cv-00002)
Submitted Pursuant to Third Circuit LAR 34.1(A)
March 28, 1995

BEFORE: MANSMANN, COWEN and LEWIS,
Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was submitted under third Circuit LAR 34.1(a) on March 28, 1995.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the District Court entered July 15, 1994 be, and the same is, hereby affirmed.

ATTEST:

/s/ P. Douglas Sisk
Clerk

April 6, 1995

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

FRED AND JANET YOUNG, d/b/a
YOUNG'S DELI and formerly d/b/a COUNTRY FAIR
STORE No. 90, on behalf of
themselves and all others similarly situated,
Plaintiffs,

AND

JAMES FOORE, d/b/a COUNTRY
FAIR STORE NO. 87, on behalf
of himself and all others similarly situated,
Plaintiff- Intervenor,

v.

COUNTRY FAIR, INC.,
MEADOW BROOK DAIRY COMPANY,
RAYMOND L. McGARVEY, KEITH McGARVEY,
GEORGE ARTHUR and GERALD GARCIA
Defendants.

ORDER OF COURT

AND NOW, this 14th day of July, 1994, for the reasons stated in the opinion filed this day, IT IS ORDERED that:

1) Defendants' motion for a protective order precluding merits discovery as to unnamed alleged potential class members (Document No. 50) be, and the same hereby is, DENIED:

2) Defendants' motion to dismiss Count XIX of the complaint in intervention (Document No. 56) be, and the same hereby is, GRANTED:

3) Plaintiffs' motion for leave to file an amended complaint (Document No. 60) be, and the same hereby is, GRANTED;

4) Plaintiff-intervenor James Foore's motion for preliminary injunction (Document No. 61) be, and the same hereby is, DENIED;

5) Plaintiffs' motion for reconsideration of this court's order denying their motion for consolidation of Civil Action Nos. 93-2 and 93-315 (Document No. 61) be, and the same hereby is, DENIED;

6) Plaintiffs Fred and Janet Young's motion for reconsideration of this court's order denying their motion for a preliminary injunction (Document No. 61) be, and the same hereby is, DENIED;

7) Plaintiffs' motion for order authorizing notice to absent class members pursuant to the Fair Labor Standards Act (Document No. 78) be, and the same hereby is, DENIED; and,

8) Defendants' motion to establish briefing scheduled (Document No. 80) be, and the same hereby is DENIED.

/s/ Gustave Diamond
United States District Judge

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IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

FRED AND JANET YOUNG, d/b/a
YOUNG'S DELI and formerly d/b/a COUNTRY FAIR
STORE No. 90, on behalf of
themselves and all others similarly situated,
Plaintiffs,

AND

JAMES FOORE, d/b/a COUNTRY FAIR STORE NO. 87,
on behalf of himself and all others similarly situated,
Plaintiff-Intervenor,

v.

COUNTRY FAIR, INC.,
MEADOW BROOK DAIRY COMPANY,
RAYMOND L. McGARVEY, KEITH MCGARVEY,
GEORGE ARTHUR and GERALD GARCIA,
Defendants.

OPINION

DIAMOND, D.J.

This is a franchise/franchisor dispute involving alleged violations of the Sherman Antitrust Act and numerous other federal and state statutory and common law provisions. Presently before the court are eight motions pending in this action. We will discuss each in turn below.

[Portions of the District Court opinion related to a motion for a protective order, a motion to Discuss, a motion to Award, and a motion to Consolidate are not reprinted here.]

[P]laintiffs Fred and Janet Young have filed a motion for reconsideration of this court's order denying their motion for a

preliminary injunction. For the reasons stated in the court's memorandum and order dated January 10, 1994, [*see* Supreme Court Appendix at A-18], the Youngs motion for reconsideration will be denied.

[P]laintiff-intervenor James Foore has filed a motion for preliminary injunction. In his motion, Foore appears to be seeking alternative forms of injunctive relief. He is seeking an order either: (1) precluding the termination of his franchise agreement during the pendency of this action, or (2) terminating his franchise agreement, but permitting him to "remain on the premises" and operate a store independent of Country Fair and Country Fair's lease with a third-party landlord. Regardless of which alternative Mr. Foore seeks, his motion suffers from fundamental flaws and therefore will be denied.

First, Country's Fair's election to terminate Mr. Foore's franchise agreement will not impair the court's ability to grant an effective remedy in this case. Mr. Foore has sued for compensatory damages for alleged antitrust violations, fraud, conversion and breach of contract. Assuming Mr. Foore can prove his claims, the court will undeniably by able to award these damages, even if the franchise agreement has been terminated. More importantly, Mr. Foore also is seeking to have the franchise agreement rescinded and declared unenforceable. Again, Country Fair's termination of the Foore franchise agreement will not preclude this court from rescinding the agreement or declaring it unenforceable.

Second, Mr. Foore has not made a clear showing of immediate irreparable injury. The only possible harm resulting from the termination of the franchise agreement would be economic injury. The Third Circuit has held that "a purely economic injury compensable in money, cannot satisfy the irreparable injury requirement." *Frank's GMC Truck Center, Inc. v. General Motors Corporation*, 847 F.2d 100, 102 (3rd Cir. 1988). *See also In Re Arthur Treacher's Franchisee Litigation*, 689 F.2d

1137, 1145 (3d Cir. 1982) ("We have never upheld an injunction where the claimed injury constituted a loss of money, a loss capable of recoupment in a proper action at law."). In his complaint, Mr. Foore is seeking money damages for alleged antitrust violations fraud, and other common law claims. He has an adequate remedy at law based on the damages he will recover, if he succeeds on his antitrust and common law claims.[1]

Finally, Mr. Foore's alternative request that this court order the termination of the franchise agreement but permit him to stay on the premises and operate a store independently is untenable. Even if Mr. Foore succeeded on the merits of his claims, this result could not be compelled. He would be entitled to damages, not gifts of leasehold interests and equipment.

> [Portions of the District Court opinion related to a class notice motion and briefing schedule motion are not reprinted here.]

An appropriate order will follow.

/s/ Gustave Diamond
United States District Judge

Date: July 14, 1994

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[1] In support of his motion, Foore cities *Bergen Drug Co. v. Parke, Davis & Co.*, 307 F.2d 725 (3d Cir. 1962) and *Bateman v. Ford Motor Co.*, 302 F.2d 63 (3d Cir. 1962). These cases are distringuishable from the instant case. In *Bergen Drug* and *Bateman*, both the temporary and permanent relief sought by the plaintiffs included the continuation of the franchise agreement. In this case, Mr. Foore is not seeking the perpetuation of the franchise agreement. In fact, he is seeking just the opposite - the rescission of the franchise agreement. It is unlikely that Mr. Foore could be harmed irreparably by the very conduct he is seeking to accomplish.

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IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

FRED AND JANET YOUNG, d/b/a
YOUNG'S DELI and formerly d/b/a COUNTRY FAIR
STORE No. 90, on behalf of
themselves and all others similarly situated,
Plaintiffs,

v.

COUNTRY FAIR, INC., MEADOW BROOK DAIRY COMPANY, RAYMOND L. McGARVEY, KEITH McGARVEY, GEORGE ARTHUR and GERALD GARCIA,
Defendants.

Civil Action No. 93-2

MEMORANDUM AND ORDER

DIAMOND, C.J.

This is a franchisee/franchisor dispute involving alleged violations of *inter alia,* the Sherman Antitrust Act, the Racketeer Influenced and Corrupt Organizations Act, and numerous other federal and state statutory and common law provisions. Plaintiff franchisees currently seek a mandatory preliminary injunction requiring defendant Country Fair, Inc. ("Country Fair") to lease the gasoline pumping equipment at 3443 Wilmington Road, New Castle, Pennsylvania to plaintiffs during the pendency of this litigation. For the reasons set forth below, the plaintiffs' motion for a preliminary injunction will be denied.

In February, 1986, plaintiffs Fred and Janet Young (the "Youngs") entered into a franchise agreement with Country Fair which authorized them to operate a Country Fair convenience store at 3443 Wilmington road. Under the terms of the agreements between the parties, the store was set-up to sell groceries,

dairy products, general merchandise and gasoline. The gasoline agreement provided that Country Fair would maintain ownership of the gasoline storage and pumping equipment, as well as the gasoline inventory, but that the Youngs would be the on-site operators of the equipment and would receive a percentage of profits on gasoline sales.

On January 4, 1993, the Youngs unilaterally terminated their franchise agreement with Country Fair and commenced doing business as Young's Deli. On January 6, 1993, after Country Fair received notice that the Youngs had terminated their franchise agreement, Country Fair placed locks on the gasoline equipment. On September 10, 1993, the Youngs filed the instant motion.

Discussion

A preliminary injunction ordinarily is granted for the purpose of maintaining the status quo during litigation. In appropriate situations, a district court has the authority to direct mandatory preliminary injunctive relief. *United States v. Price,* 688 F.2d 204, 210-12 (3d Cir. 1982). However, a plaintiff's burden to establish the traditional elements for a preliminary injunction is heightened and "particularly heavy" when, as in the present case, a plaintiff seeks mandatory preliminary relief. *Punnett v. Carter,* 621 F.2d 578, 582 (3d Cir. 1980).

The standards for granting or denying a motion for a preliminary injunction are well-established. In order to obtain a preliminary injunction, the moving party must show (1) a probability of irreparable harm, and (2) a likelihood of success on the merits. Additionally, the district court should consider (3) the effect of the issuance of a preliminary injunction on other interested persons, and (4) the public interest. *Campbell Soup Co. v. ConAgra, Inc.* 977 F.2d 86, 91 (3rd Cir. 1992). The first two factors are the primary focus of the district court's review,

and the moving party must demonstrate both are present to succeed. *Morton v. Beyer,* 822 F.2d 364, 367 (3d Cir. 1987).

In order to demonstrate irreparable harm, a plaintiff must demonstrate potential harm which cannot be redressed by a legal or an equitable remedy following a trial. The preliminary injunction must be the only way of protecting the plaintiff from harm. *Campbell Soup Co. v. ConAgra, Inc.,* 977 F.2d at 91 *(citing Continental Group, Inc. v. Amoco Chemicals Corp.,* 614 F.2d 351, 356 (3d Cir. 1980). In *ECRI v. McGraw-Hill, Inc.,* 809 F.2D 223, 226 (3rd Cir. 1987), the Third Circuit stated:

> Establishing a risk of irreparable harm is not enough. A plaintiff has the burden of proving a "clear showing of immediate irreparable injury." The "requisite feared injury or harm must be irreparable - not merely serious or substantial," and it "must be of a peculiar nature, so that compensation in money cannot atone for it."

In the instant case plaintiffs have failed to meet their burden of showing an immediate irreparable injury. First, plaintiffs argue that they are losing and will continue to lose business and customers if a preliminary injunction is not granted. Assuming *arguendo* that these assertions are true and that plaintiffs will suffer a loss of business and customers as a result of the gasoline equipment remaining locked, the harm flowing therefrom is purely economic and is compensable by money damages. As the Third Circuit has noted, "[t]he availability of adequate money damages belies a claim of irreparable injury." *Frank's GMC Truck Center, Inc. v. G.M.C.,* 847 F.2d 100, 102 (3d Cir. 1988); *see also ECRI,* 809 F.2d at 226 ("[W]e have never upheld any injunction where the claimed injury constituted a loss of money, a loss capable of recoupment in a proper action at law.").

Second, plaintiffs argue that the goodwill they have developed over the years "might be" lost if a preliminary injunction is not granted. At this point, nothing in the record indicates that

the Youngs are in danger of losing their goodwill. The record is devoid of any evidence that they will lose goodwill. This allegation appears wholly speculative and "speculative injury does not constitute irreparable injury." *Ralph Rosenberg Court Reporters, Inc. v. Fazio,* 811 F.Supp. 1432, 1442 (D.Hawaii 1993). Accordingly, plaintiffs' motion for a preliminary injunction will be denied.

An appropriate order will follow.

ORDER

AND NOW, this 10th day of January, 1994, for the reasons stated in the memorandum above, IT IS ORDERED that the plaintiffs' motion for a preliminary injunction (Document No. 34) be, and the same hereby is, denied.

/s/ Gustave Diamond
Chief Judge

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-3392

FRED YOUNG and JANET YOUNG, d/b/a
YOUNG'S DELI and formerly d/b/a COUNTRY FAIR
STORE NO. 90, on behalf of themselves and all
other similarly situated; JAMES FOORE,
d/b/a COUNTRY FAIR STORE NO. 87,
on behalf of himself and all others similarly situated

v.

COUNTRY FAIR INC.;
MEADOW BROOK DAIRY COMPANY;
RAYMOND L. MCGARVEY; KEITH MCGARVEY;
GEORGE ARTHUR; GERALD GARCIA

FRED and JANET YOUNG (The "Youngs"),
JAMES FOORE ("Mr. Foore"),

Appellants

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, MC KEE and SAROKIN, Circuit Judges

The petition for rehearing filed by appellants having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted

for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Robert E. Cowen
Circuit Judge

Dated: May 5, 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-3392

FRED YOUNG and JANET YOUNG, d/b/a YOUNG'S DELI and formerly d/b/a COUNTRY FAIR STORE NO. 90, on behalf of themselves and all others similarly situated; JAMES FOORE, d/b/a COUNTRY FAIR STORE NO. 87, on behalf of himself and all other similarly

v.

COUNTRY FAIR INC;
MEADOW BROOK DAIRY COMPANY;
RAYMOND L. MCGARVEY; KEITH MCGARVEY;
GEORGE ARTHUR; ARTHUR GARCIA

FRED and JANET YOUNG (The "Youngs"),
JAMES FOORE ("Mr. Foore")

Appellants

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF PENNSYLVANIA

(D.C. NO. 93-CV-00002)
Submitted Pursuant to Third Circuit LAR 34.1 (A)
March 28, 1995

BEFORE: MANSMANN, COWEN and LEWIS,
Circuit Judges

AMENDED JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was submitted under Third Circuit LAR 34.1 (a) on March 28, 1995.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the District Court entered July 15, 1994 be, and the same is, hereby affirmed. COSTS TAXED AGAINST APPELLANTS.

ATTEST:

/s/ P. Douglas Sisk
Clerk

Dated: April 13, 1995

Cost taxed in favor of appellees; Gerald Garcia, George Arthur, Keith McGarvey, Raymond McGarvey, Meadow Brook Dairy and Country Fair, Inc., as follows:

Brief $93.60
Total $93.60

Certified as a true copy and issued in lieu of a formal mandate on May 15, 1995.

Teste: /s/ P. Douglas Sisk

Clerk, U.S. Court of Appeals for the Third Circuit.

Supreme Court, U.S.
FILED
SEP 1 1995
CLERK

No. 95-202

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

FRED and JANET YOUNG, d/b/a YOUNG'S DELI
and formerly d/b/a COUNTRY FAIR STORE NO. 90,
on behalf of themselves and all others similarly situated;
JAMES FOORE, d/b/a COUNTRY FAIR STORE NO. 87,
on behalf of himself and all others similarly situated,
Petitioners,

v.

COUNTRY FAIR, INC.; MEADOW BROOK DAIRY COMPANY;
RAYMOND L. McGARVEY; KEITH McGARVEY;
GEORGE ARTHUR; GERALD GARCIA,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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35 pp

QUESTIONS PRESENTED

1. Whether former franchisees, who unilaterally terminated their franchise agreement without notice and maintained possession of the site of their former franchise store while they instituted suit, are entitled to a mandatory preliminary injunction forcing the franchisor to allow them to operate the franchisor's gasoline equipment and remain exposed to liability where the former franchisees have failed to allege legally cognizable irreparable harm.

2. Whether a franchisee, whom the franchisor seeks to terminate pursuant to the terms of the franchise agreement, is entitled to a preliminary injunction requiring the franchisor to continue the franchise agreement which the franchisee is simultaneously seeking to have rendered null and void.

3. Alternatively, whether a franchisee, whom the franchisor seeks to terminate pursuant to the terms of the franchise agreement, is entitled to a preliminary injunction terminating the franchise agreement but allowing him to remain on the franchisor's leasehold premises and use the franchisor's equipment.

RULE 29.1 LISTING

Respondent Country Fair, Inc. is a privately owned corporation which has no parent companies and no subsidiaries.

Respondent Meadow Brook Dairy Company is a subsidiary of Dean Foods, Inc., a publicly traded corporation.

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No. 95-202

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

FRED and JANET YOUNG, d/b/a YOUNG'S DELI and formerly d/b/a COUNTRY FAIR STORE NO. 90, on behalf of themselves and all others similarly situated; JAMES FOORE, d/b/a COUNTRY FAIR STORE NO. 87, on behalf of himself and all others similarly situated,

Petitioners,

v.

COUNTRY FAIR, INC.; MEADOW BROOK DAIRY COMPANY; RAYMOND L. MCGARVEY; KEITH MCGARVEY; GEORGE ARTHUR; GERALD GARCIA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF CASE

Respondent Country Fair, Inc. ("Country Fair")[1] is a franchisor and operator of convenience food stores in Western

1. This case was instituted against Country Fair, several of its officers and directors and Meadow Brook Dairy Company. Because the issues addressed in the Petition for Writ of Certiorari affect only Country Fair, it alone will respond to the Petition.

Pennsylvania and Eastern Ohio. (Young J.A. 1033). Petitioners Fred and Janet Young were Country Fair franchisees until January 4, 1993, when they unilaterally and without notice terminated their Country Fair franchise agreement. (Young J.A. 1026). Despite terminating their agreement with Country Fair, the Youngs remained on Country Fair's leasehold premises and continued to operate a convenience store. Thereafter, Country Fair secured the gasoline equipment at the premises which it owned, insured and for which it was liable. The Youngs sought a mandatory injunction requiring Country Fair to unlock its gasoline equipment to enable the Youngs to dispense and sell gasoline pending trial.

Petitioner James Foore ("Foore") was a Country Fair franchisee from January, 1989 until July, 1994, when Country Fair terminated its franchise agreement with him.[2] Mr. Foore sought a preliminary injunction prohibiting Country Fair from terminating his franchise agreement pending trial. Alternatively, Mr. Foore sought an injunction terminating his franchise relationship with Country Fair but permitting him to remain at the site of his former franchise store and use Country Fair's leasehold and equipment. Country Fair contends, and the courts below found, that neither the Youngs nor Mr. Foore are entitled to a preliminary injunction because neither satisfied any of the requirements for a preliminary injunction, including immediate irreparable injury.

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2. Mr. Foore filed his Motion for a Preliminary Injunction with the District Court on February 11, 1994 to prevent Country Fair's termination of his franchise agreement. Country Fair voluntarily agreed not to effectuate the termination pending the court's decision. His motion was denied on July 14, 1994. Mr. Foore filed a Notice of Appeal of the District Court's denial of his motion with the Third Circuit on July 24, 1994 as well as a Motion for Stay. Following the Third Circuit's denial of his Motion for Stay, Country Fair terminated Mr. Foore's franchise agreement. For purposes of this Brief in Opposition, however, Country Fair will discuss Mr. Foore's Motion as if he were still a Country Fair franchisee since the termination of his agreement did not occur until after he filed his Notice of Appeal. *See Bateman v. Ford Motor Co.*, 302 F.2d 63 (3d Cir. 1962).

1. The Youngs' Relationship With Country Fair

Prior to entering their franchise relationship with Country Fair, the Youngs had a franchise agreement with Convenient Food Mart of Western Pennsylvania, Inc. ("CFM"), another convenience food store franchisor. (Young J.A. 1265). The Youngs operated a CFM franchise from 1984 until February 1986 at the same site they occupy to this day (the "Premises"). (Young J.A. 1265). CFM leased the Premises from its owners, Stephen and Dorothy Lefes (the "Lefeses"). *Id.* Pursuant to that lease and with the Lefeses' consent, CFM subleased the Premises to the Youngs. *Id.*

In 1985, CFM entered into an agreement with Klasen Oil Company ("Klasen") under which Klasen installed gasoline equipment and leased a portion of the Premises for gasoline sales. (Young J.A. 1265). Pursuant to this agreement, the Youngs received compensation from Klasen only for gasoline sold in excess of 5,000 gallons each week. (Young J.A. at 1266). Klasen retained ownership in the equipment and all gasoline sold on the Premises. Klasen also reserved the right to set the prices for all gasoline sold by the Youngs.

In February, 1986, Country Fair acquired CFM's franchise business in Western Pennsylvania. In conjunction with this acquisition, CFM assigned to Country Fair all of its rights and obligations under its lease with the Lefeses, as well as its rights and obligations under its sublease with the Youngs. (Young J.A. 1265-66). At that time, the Youngs terminated their franchise agreement with CFM and entered into a franchise agreement with Country Fair. (Young J.A. 1265). The Youngs insisted their Country Fair franchise agreement be virtually identical to their former franchise agreement with CFM, rather than utilizing the standard Country Fair agreement. *Id.*

In August, 1987, Klasen sold all of its gasoline equipment on the Premises to Country Fair and transferred all of its rights under the agreement between Klasen, CFM and the Lefeses to Country Fair. (Young J.A. 1266). At about that time, the Youngs and Country Fair agreed to a gasoline addendum to their franchise agreement. *Id.* The addendum provided that Country Fair owned all of the gasoline and

gasoline equipment; would purchase the gasoline; and pay for the maintenance of the gasoline equipment, liability insurance and all regulatory compliance costs. (Young J.A. 1267). The addendum provided that as owner of the gasoline, Country Fair would set the sales price for its gas. The Youngs received 25% of the gross profits on all gasoline sales, after depreciation, repairs and maintenance. (Young J.A. 1266). The effect of the new agreement was to increase the Young's share of gas sales income.

On January 4, 1993, the Youngs filed their Complaint against Country Fair, several of its officers and directors, and Meadow Brook Dairy Company. (Young J.A. 1025-1198). The Complaint asserted twenty-seven separate causes of action against the defendants for alleged antitrust violations, RICO violations, FTC Act and FLSA claims and common law claims including fraud, conversion, breach of contract and intentional infliction of emotional distress.[3] *Id.* The Complaint alleges that the franchise arrangement which the Youngs insisted upon was inherently fraudulent. (Young J.A. 1025-1081). The Complaint seeks, among other forms of relief, rescission of the franchise agreement.

Simultaneously with filing their Complaint, the Youngs, without notice, terminated their franchise agreement with Country Fair. At that time, they ceased using the Country Fair name but held over at the site of their former franchise store. They remain at the site to this day. In addition, the Youngs continued to use Country Fair's gasoline equipment and sold Country Fair's gas from January 4 to January 7, 1993. (Young J.A. 1260). The Youngs did not and have not submitted any reimbursement to Country Fair for the sale of Country Fair's gas or use of its equipment during this period. (Young J.A. 1267). On January 7, 1993, in order to prevent the continued conversion of its property, Country Fair placed locks on its gasoline pumps. *Id.* at 1260. *Eight months later,* the Youngs

3. On December 23, 1993, the District Court dismissed the RICO, FTC Act and intentional infliction of emotional distress claims. (Young J.A. 1271-1296).

filed their motion for a mandatory preliminary injunction seeking an order requiring Country Fair to provide its gasoline equipment to them.

2. Mr. Foore's Relationship With Country Fair

Like the Youngs, Mr. Foore was also a Country Fair franchisee. (Foore J.A. 20). Mr. Foore became a Country Fair franchisee in January, 1989. (Foore J.A. 98). Prior to becoming a Country Fair franchisee, Mr. Foore had been employed at another Country Fair franchise. In late 1988, Mr. Foore approached Country Fair and asked if he could franchise its Wheatland store. (Foore J.A. 168). He was warned about the shortcomings of the store's location and facilities, and counseled as to the store's low sales volume and the fact that gasoline sales could not be added because the lot was too small. *Id.* Despite those warnings, Mr. Foore stated he could make the store profitable. *Id.*

In January 1989, a franchise agreement was executed by Mr. Foore and Country Fair. (Foore J.A. 168). That agreement provided, among other things, that Country Fair and Mr. Foore would split the gross profits at the store on a 50/50 basis. (Foore J.A. 82). Further, the agreement provided that *either* party could terminate the agreement with thirty days' notice. (Foore J.A. 78).

The premises on which Mr. Foore's store is located is owned by the Scoccia family and leased to Country Fair. (Foore J.A. 169). Country Fair is contractually obligated under the Scoccia lease until 1998. *Id.* Under that lease, Country Fair rents the premises for $1,500 per month. *Id.* It is also required to maintain insurance on the premises at an annual cost of $1,937. *Id.* In addition, Country Fair is obligated to pay for utilities and repairs to the premises. *Id.* Mr. Foore was never charged for any of these property related costs. *Id.* All of these property related expenses and costs were paid out of *Country Fair's portion* of the gross profits at the Foore store. *Id.*

Country Fair owns all of the equipment in the Foore store. (Foore J.A. 169). This equipment was purchased for

$106,915. (Foore J.A. 170). Mr. Foore was never charged for the equipment nor for its use. *Id.*

Although during his first year as a franchisee, Mr. Foore appeared to operate the store in a competent manner, since 1990 sales at the Foore store declined. (Foore J.A. 170). Commencing in 1990 and continuing through 1993, Country Fair provided Mr. Foore with written notice of various problems at his store on numerous occasions. (Foore J.A. 171). Also commencing in 1990, due to the declining sales, Country Fair discontinued charging Mr. Foore interest on his debt. (Foore J.A. 170). Country Fair also agreed to change the gross profit split from 50/50 to 55/45 (Foore/Country Fair). *Id.* Country Fair made these accommodations to assist Mr. Foore through what was hoped to be a temporary business downturn. *Id.*

Unfortunately, sales continued to decline in 1991 at Mr. Foore's store. (Foore J.A. 170). In 1992, Country Fair agreed to absorb all costs in promoting minimum price cigarette sales and to absorb any additional losses by further adjusting the gross profit split in Mr. Foore's favor. These adjustments resulted in a gross profit split in 1992 of approximately 70/30 (Foore/Country Fair). (Foore J.A. 170-71). As a result of these accommodations, Country Fair incurred losses of $46,263 and $46,650 in 1991 and 1992 on the Foore store. *Id.*

In late 1992, Mr. Foore advised Country Fair that he was experiencing stress related health problems and wished to cease his franchise relationship. (Foore J.A. 172). On February 3, 1993, Country Fair informed Mr. Foore that due to his desire to end the relationship and the continuing losses at the store, it would be willing to terminate the relationship, forgive Mr. Foore's debt, and return his initial investment. *(Id.)*

Mr. Foore asked for time to consider the offer, but never responded. (Foore J.A. 173). Instead, on February 17, 1993, the Youngs' counsel informed Country Fair's counsel she was also representing Mr. Foore.[4] *Id.* She further stated that she deemed Country Fair's offer to Mr. Foore a "secret settlement

4. Although Mr. Foore was represented by counsel as of February, 1993, he did not intervene in the Young lawsuit until January, 1994.

agreement". *Id.* As a result of counsel's threats, Country Fair ceased communication with Mr. Foore concerning the offer. *Id.*

Losses continued at the Foore store and, in 1993, Country Fair incurred a loss of $44,585 on his store. (Foore J.A. 173). In January, 1994, as a result of the losses and the deteriorating relationship between Country Fair and Mr. Foore, Country Fair elected to terminate Mr. Foore's franchise agreement pursuant to the thirty day notice provision of Article 15 of the franchise agreement. *Id.* Country Fair, however, agreed not to effectuate the termination until the district court had an opportunity to rule on Mr. Foore's Motion for Preliminary Injunction.

Mr. Foore filed his Complaint in Intervention on January 13, 1994. Like the Youngs, Mr. Foore alleges that the Country Fair franchise system is inherently fraudulent and seeks the *termination* of his franchise relationship with Country Fair. On February 11, 1994, however, Mr. Foore filed a motion for preliminary injunction to *prevent* the termination of his franchise agreement pending trial. Alternatively, Mr. Foore sought an order which would terminate the franchise agreement but allow him to remain on Country Fair's leasehold premises and use Country Fair's equipment so that he could run an "independent" store.

3. Opinions Of The Courts Below

The District Court denied the Youngs' Motion for Preliminary Injunction as well as their subsequent Motion for Reconsideration. Since the Youngs were seeking mandatory preliminary injunctive relief, the court noted a plaintiff's burden to establish the elements for a mandatory preliminary injunction is heightened and particularly heavy. (Petitioners' App. A-19).

The District Court found the Youngs failed to meet their burden of showing immediate irreparable injury. (Petitioners' App. A-20). Even assuming all of the Youngs assertions as true, the harm they would suffer if the gasoline equipment remained locked would be solely economic and compensable

by money damages. Relying on the Third Circuit's decision in *Frank's GMC Truck Center, Inc. v. General Motors Corp.*, 847 F.2d 100 (3d Cir. 1988), the court held that purely economic damages do not constitute irreparable injury and hence, the Youngs had not satisfied the requirements necessary to attain a preliminary injunction. (Petitioners' App. A-20).

Moreover, the court also determined that the Youngs' argument that they *might* lose goodwill without a preliminary injunction was insufficient. Relying on *Ralph Rosenberg Court Reporters, Inc. v. Fazio,* 811 F.Supp. 1432 (D.Hawaii 1993), the court held that the Youngs' allegation that they might lose goodwill was wholly speculative and did not constitute *imminent* irreparable injury. (Petitioners' App. A-21).

The District Court also denied Mr. Foore's Motion for a Preliminary Injunction. Similar to its findings with respect to the Youngs, the court determined that Mr. Foore had not made a clear showing of immediate irreparable injury. The court concluded that the only harm which could result from the termination of the franchise agreement was economic injury. *Id.* The court held that Mr. Foore had an adequate remedy at law to recover his economic injury should he be successful at trial. (Petitioners' App. A-16).

The court also found Country Fair's termination of the franchise agreement would not impair the court's ability to grant an effective remedy. (Petitioners' App. A-15). Additionally, the court noted that since Mr. Foore was ultimately seeking to have the franchise agreement rescinded and declared unenforceable, Country Fair's decision to terminate the agreement would not preclude the court from rescinding the agreement should Mr. Foore prove successful on the merits of his case.

Finally, in addressing Mr. Foore's alternative request for relief, the court found Mr. Foore's request to terminate his franchise agreement and remain on the premises untenable. (Petitioners' App. A-16). The District Court found that even if Mr. Foore were to succeed on the merits, he could not compel this result since he would be entitled to damages and not gifts of land and equipment. *Id.*

The Third Circuit affirmed the District Court's denial of both the Youngs' and Mr. Foore's Motions for Preliminary Injunction. The Third Circuit agreed with the District Court that the Youngs were not in danger of suffering irreparable injury because any injury which would result from the loss of customer traffic is purely economic. (Petitioners' App. A-7). Moreover, the Third Circuit supported the District Court's decision based on the *Youngs' failure to produce evidence demonstrating imminent danger. Id.*

Similarly, the Third Circuit agreed with the District Court that Mr. Foore failed to satisfy the immediate irreparable injury requirement. (Petitioners' App. A-8). Further, the Third Circuit stated that the District Court had correctly found that Country Fair's decision to terminate its franchise agreement with Mr. Foore would not impede the Court's ability to grant an effective remedy. *Id.* In addressing Mr. Foore's alternative request that he be permitted to remain on the premises without a franchise agreement, the Third Circuit agreed with the District Court that the request was untenable. *Id.*

The Third Circuit also took issue with Mr. Foore's argument that the District Court erred by ignoring his ultimate claims for equitable relief when it denied his motion for preliminary injunction. The Third Circuit stated the relief Mr. Foore was ultimately seeking was irrelevant to the District Court's determination that Mr. Foore had not met his burden of demonstrating irreparable harm. (Petitioners' App. A-9).

With respect to both the Youngs and Mr. Foore, the Third Circuit concluded it was unnecessary to address the other arguments in support of their motions for preliminary injunctions because both parties had failed to establish immediate irreparable injury. *Id.* Accordingly, the Third Circuit affirmed the District Court's decisions and concluded that the District Court's denial of the Youngs' and Mr. Foore's motions was not an abuse of discretion, an error of law or a mistake in considering the proof. (Petitioners' App. A-2).

SUMMARY OF REASONS WHY THE PETITION SHOULD BE DENIED

This Petition for Writ of Certiorari should be denied. The Third Circuit's decision affirming the denial of Petitioners' Motions for Preliminary Injunction does not conflict with decisions in other circuits involving similar circumstances. Federal courts throughout the country have consistently and uniformly held that in order to obtain a preliminary injunction, a moving party must show, at the very least, 1) a likelihood of success on the merits and 2) a probability of immediate irreparable injury. Both Petitioners failed to meet their burden of demonstrating immediate irreparable injury and thus, are not entitled to preliminary relief.

There is no conflict in the circuits as to whether loss of business constitutes irreparable injury. When, as in this case, the loss of customers results in purely economic harm which is compensable by monetary damages, the courts have concluded that this is not irreparable injury. More importantly, the question of whether loss of business can constitute irreparable harm depends solely on the facts of each case. Factual differences among cases do not give rise to a conflict in the circuits. For the same reason, Petitioners' reliance on *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197 (2d Cir. 1970) is misplaced because, as many courts have recognized, the *Semmes* holding is based squarely on the specific facts of that case.

Petitioners' argument that the Third Circuit incorrectly interpreted the scope of the Clayton Act §16 remedy is to no avail. Since Petitioners failed to satisfy the requirements necessary for a preliminary injunction, the Court's powers under the Clayton Act are of no consequence.

The lower courts' failure to address Petitioners' argument that a preliminary injunction was necessary so that they might generate evidence for trial is not a basis to grant certiorari. The novelty of the argument aside, once the lower courts determined that Petitioners failed to demonstrate immediate irreparable injury, it was unnecessary for those courts to address Petitioners' additional arguments. Failure of a movant

to satisfy one of the crucial elements necessary to obtain a preliminary injunction provided sufficient basis to defeat Petitioners' motions.

The Petition for Writ of Certiorari should also be denied because this Court's favorable resolution of Petitioners' issues would not alter the fact that Petitioners are incapable of satisfying the other prerequisites for a preliminary injunction. Hence, the decisions below would be affirmed regardless of the issue presented here.

Finally, the Petition should be denied because the question which Petitioners present is neither new nor a compelling question of law warranting this Court's review. Resolution of the questions presented affects only the parties in this case. This is not a case of national importance nor is it a case which presents novel legal issues. Moreover, it is a fact specific question. The issues which Petitioners ask this Court to address have long been settled and currently receive uniform treatment by the federal courts. For all of these reasons, the Petition for Writ of Certiorari should be denied.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE THIRD CIRCUIT'S DECISION IS NOT IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS AND FOLLOWS WELL ESTABLISHED PRINCIPLES THAT ECONOMIC LOSS DOES NOT CONSTITUTE IRREPARABLE INJURY

Petitioners' primary basis for the Petition for Writ of Certiorari is their claim that there is a conflict in the circuit courts as to whether loss of business constitutes irreparable harm. Petitioners rely on a series of old cases, including *Semmes,* for the proposition that loss of business and customers constitutes irreparable injury. Not only are the cases cited by Petitioners factually distinguishable from the present case, Petitioners have also ignored the fact that what they interpret to be a conflict among the circuits is nothing more than distinct decisions based upon the individual facts and issues presented to each court. For these reasons, the Petition for Writ of Certiorari should be denied.

A. All Of The Circuit Courts Uniformly Require That A Movant Demonstrate Immediate Irreparable Injury And Likelihood Of Success On The Merits For A Preliminary Injunction To Issue

There is no dispute among the circuit courts that a party seeking a preliminary injunction must satisfy several uniform requirements. For example, the Third Circuit has held that a plaintiff must meet certain burdens before the extreme remedy of a preliminary injunction will be granted. *In re Arthur Treacher's Franchisee Litigation*, 689 F.2d 1137 (3d Cir. 1982). These include: (1) a reasonable probability of eventual success on the merits and (2) that the movant will be irreparably injured *pendente lite* if relief is not granted. *Id.* at 1143. In addition, while the burden rests upon the moving party to make these two requisite showings, the District Court also must take into account, when they are relevant: (1) the possibility of harm to other interested persons from the grant or denial of the injunction and (2) the public interest. *Id.* (citing *Oburn v. Shapp*, 521 F.2d 142, 147 (3d Cir. 1975)).

Without exception, all federal appellate courts require a movant to demonstrate irreparable harm and a likelihood of success on the merits in order for a preliminary injunction to issue. *See, e.g., Goff v. Harper*, 60 F.3d 518 (8th Cir. 1995); *Tough Traveler, Ltd. v. Outbound Products*, ____ F.3d ____, 1995 WL 438394, No. 1691, Docket 94-9286 (2d Cir. July 21, 1995); *Church v. City of Huntsville*, 30 F.3d 1332 (11th Cir. 1994); *Stanley v. University of Southern California*, 13 F.3d 1313 (9th Cir. 1994); *Keweenaw Bay Indian Community v. Michigan*, 11 F.3d 1341 (6th Cir. 1993); *Autoskill, Inc. v. National Educational Support Systems, Inc.*, 994 F.2d 1476 (10th Cir.), *cert. denied*, 114 S.Ct. 307 (1993); *Roho, Inc. v. Marquis*, 902 F.2d 356 (5th Cir. 1990); *Roger Corp. v. Litton Systems, Inc.*, 757 F.2d 1266 (D.C. Cir. 1985); *Massachusetts Association for Retarded Citizens, Inc. v. King*, 668 F.2d 602 (1st Cir. 1981); *O'Connor v. Board of Education of School District No. 23*, 645 F.2d 578 (7th Cir.), *cert. denied*, 454 U.S. 1084 (1981); *Maryland Undercoating Co., Inc. v. Payne*, 603 F.2d 477 (4th Cir. 1979).

While some federal courts, such as the Third Circuit, require that a movant satisfy these standards without consideration of other issues, other courts engage in a balancing test to determine the burden of proof necessary for each element. *See e.g., Jeffrey Milstein, Inc. v. Greger, Lawlor, Roth, Inc.*, 58 F.3d 27 (2d Cir. 1995). Regardless of the method employed, all federal courts engage in an almost identical analysis to determine whether the movant has satisfied all of the necessary requirements for the extraordinary relief of a preliminary injunction. Accordingly, there is no split in the circuits on this issue.

B. The Cases Upon Which Petitioners Rely To Assert A Conflict Among The Circuits Are Distinguishable And Inapposite To The Facts In This Case

It follows that if all of the circuits employ the same analysis to determine whether preliminary injunctive relief is warranted, the reason why some holdings appear to conflict is because the facts of each case are unique. "What may constitute irreparable harm in a particular case is, of course, dependent upon the particular circumstances of the case." *Oburn v. Shapp*, 521 F.2d 142, 151 (3d Cir. 1975). Petitioners have failed to recognize that the occurrence of irreparable harm is a highly fact specific determination. *See Roland Machinery Co. v. Dresser Industries*, 749 F.2d 380, 385 (7th Cir. 1984). ("Our discussion of the standard for ruling on requests for preliminary injunctions should have made clear that it is not possible to reconcile all the precedents, or even just all the ones in this circuit"). For this reason, Petitioners have mistakenly concocted a split in the circuits where one does not exist.

Petitioners rely on a series of cases for the proposition that a conflict exists regarding whether potential loss of business, customers and/or profits constitutes irreparable injury. Petitioners argue these cases demonstrate that the Third Circuit incorrectly relied on *Frank's GMC Truck Center* for the proposition that economic loss does not satisfy the irreparable injury requirement. The cases cited by Petitioners, however, do not support this conclusion. In fact, the cases cited by Peti-

tioners are all factually distinguishable from the present case and do not give rise to a conflict among the circuits. Moreover, examination of the reasoning which led those courts to grant injunctive relief, reveals that those courts would have also denied Petitioners' motions based upon the facts presented.

The two most recent cases cited by Petitioners in support of their proposition, *Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp.*, 990 F.2d 25 (1st Cir. 1993) and *Roland Machinery Co.*, 749 F.2d 380, actually support the decision here. In both cases, plaintiff's request for a preliminary injunction was *denied* because it had not demonstrated it was about to suffer immediate irreparable injury. This is exactly what occurred in the case at bar.

In *Coastal Fuels,* the First Circuit held that in addition to failing to demonstrate that it had a likelihood of success on the merits, plaintiff had also failed to show that it would "suffer 'irreparable harm' that a later damage award could not avoid." 990 F.2d at 27. The court reached this conclusion despite plaintiffs' allegations that they would not be able to continue doing business without a preliminary injunction. *Id.* Similarly, in *Roland Machinery,* the Seventh Circuit reversed the district court's grant of a preliminary injunction despite plaintiff's contention that it would go out of business without one. 749 F.2d at 396.

All of the other cases cited by Petitioners are distinguishable because they turn upon individual facts. This is most obvious when reviewing the factors which persuaded the court in *Semmes* to grant a preliminary injunction enjoining defendant from terminating the plaintiff's car dealership. In *Semmes,* the court determined that the loss of the dealership was sufficient to satisfy the irreparable injury requirement because the plaintiff had run his business for *twenty years* so that the loss of the business would be a tremendous hardship.

Contrary to many of the cases cited by Petitioners which were decided immediately following the *Semmes* decision, many recent decisions have not followed *Semmes* precisely because its holding was so fact specific. For example, the Second Circuit declined to follow *Semmes* in *Jack Kahn Music Co., Inc. v. Baldwin Piano & Organ Co.*, 604 F.2d 755 (2d Cir.

1979) because the court determined that the most significant aspect of *Semmes* was not that the loss of the dealership constituted irreparable harm, but rather that "the dealership had continued over twenty years during which Semmes had built up a very considerable goodwill in Scarsdale and the dealer's son had recently entered the business, doubtless with hopes of succeeding to it when his father became too old." 604 F.2d at 761. Without question, the fact that Semmes had run his dealership for over two decades and the fact that his son aspired to own it after his father's retirement was clearly given great weight by the court. For this reason, the *Jack Kahn* court concluded that it was inappropriate to apply *Semmes* to any and every case where the movant faced a loss of business which money damages would more than adequately compensate. Indeed, the *Jack Kahn* court vacated a district court's entry of a preliminary injunction and held that the potential loss of business, based upon a contract which was only one and one-half years old, was insufficient to satisfy the irreparable injury requirement.

Similarly, in *Flagship Federal Savings Bank v. Wall*, 748 F.Supp. 742, (S.D.Cal. 1990), despite the plaintiff's reliance on *Semmes* and its allegations that it would be irreparably harmed by lost business opportunities, the court found the *Semmes* holding "limited to its facts", *Id.* at 747, and refused to order relief. Like the court in *Jack Kahn*, the *Flagship* court found it noteworthy that *Semmes* held "the 'right to continue a business in which William Semmes had engaged for *twenty years* and into which his son had recently entered is not measurable *entirely* in monetary damages'." *Id.* (citations omitted) (emphasis added).

Without question, the *Semmes* holding cannot be extended to other cases because that court's decision is inextricably intertwined with the facts in that case. Cases which have followed *Semmes* have done so only because the facts of those cases warranted extraordinary relief. In this case, however, the District Court, which is in the best position to review the facts available in the record, determined extraordinary relief was not warranted because the damages Petitioners *may* suffer absent injunctive relief are not irreparable. A cursory

review of the facts presented to the District Court demonstrates why injunctive relief is not warranted in either the Youngs' or Mr. Foore's case.

1. The *Semmes* Holding is Inapplicable to the Youngs' Case

With respect to the Youngs, any lost profits or loss of customers resulting from the locked gasoline pumps is due to their actions, not those of Country Fair. *It was the Youngs who, without warning, terminated their franchise agreement with Country Fair.* It was the Youngs' theft of gasoline which precipitated the locking of the gasoline pumps in January, 1993. For several days after the Youngs' unilateral termination of the franchise agreement, the Youngs used Country Fair's gasoline equipment and sold thousands of gallons of its gasoline without the consent of Country Fair. At no time have the Youngs ever reimbursed Country Fair for the use of its equipment or for the sale of its assets. Country Fair exercised its right to protect its property. It locked its gasoline equipment to prevent further depletion of its assets and other risks of loss. Any injury the Youngs may have suffered, or will suffer, is of their own doing.

Unlike the plaintiff in *Semmes,* the Youngs' request for a preliminary injunction has nothing to do with a manufacturer's bad faith termination of a dealer. Here *the Youngs* terminated their franchise agreement. Moreover, unlike Semmes, the Youngs are still conducting their convenience store business. They have been precluded only from selling gasoline using Country Fair's equipment. Country Fair was simply protecting its property and assets from wrongful conversion when it locked its pumps. If the Youngs are now suffering some loss of business, it is because of their own actions. There was and is no just reason to compel Country Fair to open its pumps to ameliorate the effects of the Youngs' own intentional misconduct. Accordingly, the Youngs' reliance on the *Semmes* decision is misplaced.

2. The Holding in *Semmes* is Inapplicable to Mr. Foore's Case

Similarly, the facts of Mr. Foore's case significantly distinguish him from the plaintiff in *Semmes*. In *Semmes*, the court entered a preliminary injunction to preserve a *successful* dealer which had been in operation for *twenty years*. In contrast, Mr. Foore had been an unsuccessful Country Fair franchisee for only *four* years when Country Fair first gave notice of its desire to terminate the relationship. In those four years, Mr. Foore incurred growing substantial financial losses which were borne in an ever increasing percentage by Country Fair. There is simply no comparison between Mr. Foore's situation and that of the capricious termination of a long term profitable dealer in danger of losing his successful twenty year investment.

Moreover, as opposed to the plaintiff in *Semmes* who desired to continue as a Ford dealer, Mr. Foore seeks just the opposite relief — the rescission of the franchise agreement. This is perhaps the best evidence that Mr. Foore will not be irreparably harmed because he is not seeking the indefinite perpetuation of that agreement.

Further, Mr. Foore has recognized that the "status quo" that he sought to maintain with a preliminary injunction "is a franchise agreement which I claim is illegal and fraudulent". (Foore J.A. 129). Credit for novelty aside, it is inconceivable that Mr. Foore could be irreparably harmed by the termination of his franchise agreement when that is the very goal of his law suit. Since Mr. Foore contends that the franchise agreement is fraudulent, it is difficult to fathom how the termination of an alleged fraudulent agreement would, in any way, irreparably injure him.

The other significant distinction between *Semmes* and Mr. Foore's case is that in *Semmes,* Ford was limited to terminating Semmes' dealership only in accordance with the Federal Dealer Act, 15 U.S.C. §1222. Under this Act, Ford could only terminate a dealer who submitted false or fraudulent reports or statements to the company and the dealer had a right to cure his failure to perform and prevent the termination of his

dealership. In Mr. Foore's case, however, his franchise agreement with Country Fair provides that *either* party can terminate the agreement for *any* reason, at *any* time with thirty days notice.

Finally, the termination of Mr. Foore's franchise agreement does not, in any manner, prevent him from owning and operating his own convenience store in Wheatland. He simply cannot do it with Country Fair's leasehold, equipment and subsidy. Accordingly, the holding in *Semmes* is inapplicable.

C. Recent Cases Hold That Economic Loss Does Not Constitute Irreparable Injury

Despite Petitioners' arguments, more recent decisions by circuit courts have found loss of business, customers and/or profits a purely economic loss for which monetary damages can compensate. Accordingly, the courts have held that these kinds of losses do not constitute irreparable injury. As discussed above, the Second Circuit in *Jack Kahn* held that potential loss of business did not satisfy the irreparable injury prong. The court in *Flagship* also determined that potential lost business opportunities were not irreparable injuries.

Further, the Third Circuit has also determined that monetary injury will not satisfy the necessary burdens to achieve a preliminary injunction. *See Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797 (3d Cir. 1989); *Frank's GMC Truck*, 847 F.2d 100. In *Instant Air Freight* the Third Circuit stated:

> Here the monetary damages which Instant alleges it is suffering are capable of ascertainment and award at final judgment if Instant prevails. These money damages will fully compensate Instant for its losses.

Id. at 801. Similarly, in *Frank's GMC Trucks*, the Third Circuit stated:

> [A] purely economic injury, compensable in money, cannot satisfy the irreparable injury requirement. "Although we are not insensitive to the financial distress suffered by [the plaintiff], we do not believe that loss of income alone constitutes irreparable harm."

847 F.2d at 102 (*citing Morton v. Beyer*, 822 F.2d 364, 372 (3d Cir. 1987)).

Other courts have also held that loss of business can be compensated by money damages and hence, cannot constitute irreparable injury. *See, e.g., Coastal Fuels, 990 F.2d 25; DFW Metro Line Services v. Southwestern Bell Telephone Co.*, 901 F.2d 1267, 1269 (5th Cir.), *cert. denied*, 498 U.S. 985 (1990) (denial of preliminary injunction affirmed due to plaintiff's failure to demonstrate that money damages would be inadequate compensation). These cases compel the conclusion that there is not a conflict in the circuits, but merely a difference in facts among the cases. Accordingly, the Youngs' and Mr. Foore's Petition for Writ of Certiorari should be denied.

II. THE COURT OF APPEALS' RULING NEITHER VIOLATES THE CLAYTON ACT NOR PRECLUDES THE COURT FROM ULTIMATELY AWARDING LEGAL AND/OR EQUITABLE RELIEF

Petitioners contend that in affirming the denial of their motions for preliminary injunction, the Third Circuit was, in effect, holding that §16 of the Clayton Act does not permit a federal court to order the defendant to continue supplying the "tying product" to the plaintiff. This argument is not only without legal support and illogical, it is nothing more than a red herring to distract this Court from the deficiencies in the Petition. The Third Circuit's decision does not in any manner limit the equitable powers that §16 of the Clayton Act, 15 U.S.C. §26, confers on the federal courts. Here the Third Circuit simply concluded that Petitioners had not demonstrated irreparably injury.

Careful review of Petitioner's argument reveals its fallacy. Simply because §16 of the Clayton Act provides that an antitrust plaintiff may be entitled to injunctive relief, does not lead to the conclusion that Petitioners: 1) are excused from satisfying the requirements necessary for a preliminary injunction; and 2) are automatically entitled to the relief they seek. Further, §16 of the Clayton Act does not permit a court to enter an injunction which alters the status quo pending trial and which compels third parties to become involved in the dispute.

Regardless of the ultimate relief which Petitioners seek and regardless of the equitable relief that the court may bestow upon them, in order for them to obtain preliminary injunctive relief, they must demonstrate that they are in danger of suffering immediate irreparable injury. This requirement appears not only in the common law — it exists in the statute as well. Section 16 of the Clayton Act provides:

> Any person . . . shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws . . . and upon the execution of proper bond against damages for an injunction improvidently granted and *a showing that the danger of irreparable loss or damage is immediate,* a preliminary injunction may issue . . .

Id. (emphasis added).

There is nothing in the statute which creates an exception for a plaintiff with tying claims being excused from the irreparable injury requirement. The antitrust laws prohibit the tying of one product to another which results in harm to competition. They do not mandate nor require the provision of the tying product in all instances to all parties. Accordingly, Petitioners' request for certiorari because they are being deprived of the tying product without an injunction is to no avail.

Mr. Foore argued the same issue to the Third Circuit in a somewhat different guise. He contended the District Court had ignored his claim for ultimate injunctive relief and that by denying his motion for preliminary injunction, it had concluded that "he was not free to pursue any antitrust claims for injunctive relief." (Petitioners' App. A-8, 9). The Third Circuit found Mr. Foore's contentions erroneous because "[t]he permanent relief requested by Foore is irrelevant to the district court's determination of irreparable harm. If Foore were to succeed on the merits, the district court will be free to fashion whatever legal or equitable relief is warranted." (Petitioners' App. A-9).

Petitioners' Clayton Act argument also fails because the relief which they seek through the Clayton Act would severely alter the status quo pending trial, not preserve it. This Court

has held that "[t]he purpose of a preliminary injunction is merely to *preserve* the relative positions of the parties until a trial on the merits can be held." *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). Mr. Foore, however, seeks much more. He wants to have his franchise agreement terminated but be permitted to remain at the site of his former franchise store pending trial.

Although below Mr. Foore sought alternative forms of preliminary relief, it appears he has now abandoned his request to have Country Fair enjoined from terminating his franchise agreement. Rather, he now seeks to have the agreement terminated but keep possession of Country Fair's premises and equipment. *See* Petitioners' Brief at 12, 23-24. Thus, Mr. Foore is seeking to change the status quo from one where he is a Country Fair franchisee to one where there is no relationship with Country Fair, but he remains on Country Fair's leasehold premises and uses Country Fair's equipment to run his store independent of Country Fair. Mr. Foore's request not only contravenes the purpose of a preliminary injunction, but as the Third Circuit found, it is also specious. (Petitioners' App. A-9).

Similarly, the Youngs seek to use Country Fair's gasoline equipment despite having terminated their franchise agreement. Like Mr. Foore, the Youngs also seek a change in the status quo to create a new relationship.

There is no language in §16 of the Clayton Act which suggests that it can be used to order a preliminary injunction which alters the status quo. There is also nothing in the statute which suggests that it is permissible to alter the status quo simply because the movant has made antitrust tying allegations. The relief which Petitioners seek is simply untenable and cannot be compelled. (Petitioners' App. A-16).

Moreover, Mr. Foore requests relief which would require the court to not only force Country Fair to sublease space to him but which would also force non-parties to this litigation, the owners of the property, to rent the property to him. As the District Court stated in its opinion, "[e]ven if Mr. Foore succeeds on the merits of his claims, this result could not be compelled. He would be entitled to damages, not gifts of leasehold

interests and equipment." (Petitioners' App. A-16). The Clayton Act was not meant to be used to needlessly involve non-parties to the litigation in the dispute. Accordingly, the Petition for Writ of Certiorari should be denied.

III. PETITIONERS SHOULD NOT BE PERMITTED TO USE A PRELIMINARY INJUNCTION AS A TOOL TO MANUFACTURE EVIDENCE IN SUPPORT OF THEIR ACCUSATIONS

Despite the numerous allegations in their Complaints regarding Country Fair's wrongdoing, Petitioners' motions for preliminary injunction are devoid of any evidence that they will suffer irreparable loss of profits or loss of goodwill without injunctive relief. In fact, Petitioners boldly contend they require a preliminary injunction to enable them to manufacture evidence which they might later use to support their allegations at trial. The Youngs and Mr. Foore argue that the very absence of supporting evidence constitutes irreparable injury because if they are not given an opportunity to generate corroboration, they will not succeed on the merits of their claims. This argument is absurd.

Despite the numerous affidavits and declarations filed by Petitioners in their effort to obtain injunctive relief, they have failed to offer any concrete evidence regarding the injury they will suffer absent an injunction. The best indication the Youngs could offer was that a decrease in customer traffic *could* result in the loss of their business. (Young J.A. 1241). This is insufficient. *See Punnett v. Carter,* 621 F.2d 578, 587 (3d Cir. 1980). The Youngs failed to provide any financial data or accounting evidence that their business had, in fact, decreased or that it is in danger of decreasing further in the future. "Mere assertions of dire economic effects cannot, without some concrete proof, meet the irreparable harm standard." *Coca-Cola Bottling Co. of Elizabethtown, Inc. v. Coca-Cola Co.,* 668 F.Supp. 906 (D.Del. 1987).

More importantly, the assertions offered by the Youngs undermine their argument. In their declaration the Youngs asserted that they are making *more* money now than they

were as a Country Fair franchisee. (Young J.A. 1250). This statement is telling for two reasons. First, obviously, the Youngs have not been injured if they are making more money now. Second, the fact that they know they are making more money now indicates there is evidence of how much they made under the Country Fair system. Without a doubt, the Youngs have not demonstrated that they need an injunction.

Similarly, Mr. Foore alleged that without a preliminary injunction, he may lose goodwill. Mr. Foore did not offer any evidence, however, of this potential loss of goodwill. Thus, his arguments too fell far short of what is needed to demonstrate immediate irreparable injury. For these reasons, the Petition for Writ of Certiorari should be denied.

IV. THE DECISION OF THE COURT OF APPEALS WAS CORRECT AND THE ISSUES PRESENTED BELOW DO NOT MERIT REVIEW BY THIS COURT

The Petition for Writ of Certiorari should also be denied because it fails to meet any of the criteria for certiorari. As discussed above, the issues raised in this appeal do not involve a conflict in the circuit courts. Additionally, the issues raised in this appeal are so unique to the Youngs and Mr. Foore that their resolution will affect no one other than the litigants. It is difficult to imagine another case where a franchisee terminates a franchise agreement, holds over on the subleased premises, sues the franchisor, and then brings a motion for a mandatory preliminary injunction seeking an order to force the franchisor to provide its gasoline equipment to the former franchisee. Given that the present case turns upon its own facts and the resolution of the issues presented would not be of any significance to anyone other than the parties, the Petition should be denied.

In addition, the Petition should be denied because Petitioners have also not satisfied the other requirements for a preliminary injunction. Hence, even if the Court found irreparable injury, Petitioners would still not be entitled to a preliminary injunction. Neither the Youngs nor Mr. Foore offered any concrete evidence that they would succeed on the merits of

their complaints. In fact, the gist of both of Petitioners' motions was based upon unsupported averments made on "information and belief." Averments based on such prayers do not demonstrate a reasonable likelihood of success on the merits especially when the claims are based on fraud. The best evidence of Petitioners' inability to establish likelihood of success on the merits is their own argument that they need an injunction to secure evidence for their claims.

Mr. Foore would also not be entitled to injunctive relief because it would result in great harm to Country Fair. In ruling on a request for a preliminary injunction, a court must also consider the effect the injunction would have on the non-moving party. *See Campbell Soup Co. v. ConAgra, Inc.*, 977 F.2d 86, 91 (3d Cir. 1992); *Bradley v. Pittsburgh Board of Education*, 910 F.2d 1172, 1175 (3d Cir. 1990). Under either of the alternative preliminary injunctions originally requested by Mr. Foore, Country Fair would incur substantial losses which cannot be recovered, since Mr. Foore has stated that he has no assets. (Foore J.A. 121). Since 1989, Country Fair has incurred losses in excess of $150,000 as a result of the operation of the Foore franchise. (Foore J.A. 172). These losses have grown each year. *Id.* Continuation of the franchise relationship would only increase the losses to Country Fair.

Of even greater significance is the operation of the franchise itself. A successful franchise requires the cooperation and trust between the franchisee and the franchisor. Obviously, as a result of this litigation, Mr. Foore has no incentive nor reason to cooperate with Country Fair. The Second Circuit has recognized the significant hardship of forcing a manufacturer to continue in a dealer relationship with a dealer with whom it no longer wishes to be associated. *See Jack Kahn*, 604 F.2d at 764. That same principal is even more applicable here.

Mr. Foore's alternative request for injunctive relief results in even greater harm to Country Fair. Under that alternative, Mr. Foore requests that the court order the termination of the franchise agreement but permit Mr. Foore to "stay on the premises" and keep or lease Country Fair's equipment. Country Fair, however, is obligated to pay rent, insurance, a portion of the taxes and other expenses for the premises. (Foore J.A.

169). In the absence of a franchise relationship, the court would be compelling Country Fair to make a gift of the leasehold interest and the equipment to Mr. Foore. A preliminary injunction cannot be used to take property out of the possession of one party and put it into the possession of the other. *Gamlen Chemical Co. v. Gamlen,* 79 F.Supp. 622, 631 (W.D.Pa. 1948). For this reason, it would be inappropriate for Mr. Foore to be granted a preliminary injunction.

Petitioners are also not entitled to injunctive relief because it would require substantial court supervision. Courts have routinely and repeatedly denied preliminary injunctions requiring court supervision. *See Roland Machinery,* 749 F.2d at 391; *CBL & Assoc., Inc. v. McCrory Corp.,* 761 F.Supp. 807 (M.D.Ga. 1991); *8600 Associates, Ltd. v. Wearguard Corp.,* 737 F.Supp. 44 (E.D. Mich. 1990); *Gilchrist Machinery Co., Inc. v. Komatsu America Corp.,* 601 F.Supp. 1192 (S.D.Miss. 1984); *Grossman v. Wegman's Food Markets, Inc.,* 43 A.D.2d 813, 350 N.Y.S.2d 484 (1973).

If Mr. Foore is granted a preliminary injunction compelling the continuation of the franchise agreement during the course of the litigation, it will require vigilant and constant court supervision to ensure that both parties comply with all terms of the franchise agreement. Moreover, if Mr. Foore is permitted to remain on the premises without a franchise agreement, the court would be required to rewrite the agreement between the parties to determine who would pay the rent, taxes, insurance and other property related expenses, as well as possibly involve a non-party to the litigation, the owner of the premises.

Similarly, if the gasoline pumps were ordered opened for the Youngs, significant judicial supervision would be mandated. The court will have to determine among other things: who will be allowed to lease the pumps, what is a fair rental value, who should be allowed to supply gasoline to the tanks, the hours the pumps should be operated and who should pay the taxes and liability insurance on the pumps. Given the nature of gasoline, the taxes that must be paid, as well as the liability arising from the operation of gasoline equipment, this supervision is considerable. Accordingly, the need for judicial

supervision mandates that neither Petitioner would have been granted injunctive relief, even if they had demonstrated irreparable injury.

Finally, the public interest does not support a preliminary injunction because the public does not have a significant interest in having Mr. Foore continue to operate his convenience store or in having the gasoline pumps unlocked at the Youngs' store. Both Mr. Foore and the Youngs are seeking to provide services that the public can easily secure elsewhere. For all of these reasons, the Petition for Writ of Certiorari should be denied.

V. THE THIRD CIRCUIT'S DECISION IS INTERLOCUTORY IN NATURE AND THEREFORE THE COURT SHOULD DENY THE YOUNGS' AND MR. FOORE'S PETITION

Certiorari jurisdiction is "to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision .... And, except in extraordinary cases, the writ is not issued until final decree." Robert L. Stern et al., Supreme Court Practice 196 (7th ed. 1993) (quoting *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916)). Consequently, the interlocutory nature of a federal court of appeals judgment may "of itself alone" constitute "sufficient ground for the denial of the application" for certiorari. *Id.* Although the Court has granted certiorari where the interlocutory judgment presented a novel and important issue of law and where the petitioner's position, if embraced, would render the court of appeals decision void, *American Construction Co. v. Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372 (1893), none of those circumstances exist here. This case does not involve a novel nor important issue of law. The case simply involves a factual question limited to the parties in this matter.

No final judgment has been rendered in this case. In fact, although Petitioners filed this case as a class action, their Motion for Class Certification is still pending. Discovery has begun, but is far from complete. Efficiency dictates that the

Court's review be deferred until there has been a final judgment. As one commentator has asked "why should the vast clanking machinery of the United States Supreme Court be mobilized to decide a question that may not make a difference in the outcome of the case?" Stewart A. Baker, *A Practical Guide to Certiorari*, 33 Cath. Univ. L. Rev. 611, 628 (1984). Here, given the unique facts of this case, the denial of this request for preliminary injunction does not warrant this Court's review.

CONCLUSION

The Petitioners have had their chance at bat. They have swung and missed — not because the umpires were unfair, but because they had no bat. They could show no irreparable harm, no conflict in the circuits, no judicial error, nor overriding public interest. In the absence of an error, no one gets to first base on a strike out. To argue that a preliminary injunction should be granted so that evidence can now be gathered, is like asking for batting practice while the game is pending. It simply does not happen.

Accordingly, the Youngs and Mr. Foore's Petition for Writ of Certiorari should be denied.

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